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**THE
SECOND SUPPLEMENTARY REPORT**

OF

**JUSTICE K. N. SAIKIA COMMISSION OF INQUIRY
ON THE THIRD GROUP OF TEN CASES**

ON

SECRET KILLINGS

SUBMITTED TO THE GOVERNMENT OF ASSAM

ON

MARCH 15th, 2007

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THE SECOND SUPPLEMENTARY REPORT OF JUSTICE K.N. SAIKIA COMMISSION OF INQUIRY

ON THE THIRD GROUP OF TEN CASES

(Submitted to Government of Assam on 20.2.2007)

..... By Notification No.PLA 331/2005/2 dated 3rd. September 1005 in continuation of the earlier NotificationNo.331/2005 dated 22.8.2005, the Governor of Assam was pleased to to order that this Ccomjmission of Inquiry shall inquire into any other incidents of killings under similar circumstances which occurred during the period from January 1998 to 2001. This third group of fifteen cases are squarely covered by the said Notification, these having been cases of secret killings which occurred during the period prescribed thereby. The Commission has, therefore, decided to inquire into these cases; with intimation to the State Government, and submitg this Continuing Report for consideration and necessary action.. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case, the following terms of reference, and any other matters with recommendations, if any, namely:

- “(a) Circumstances , in each case, leading to the killing of the victims of these cases.
- (b) Identity of the killer(s) and accomplice(s), if any.
- (c) To find out whether there was any conspiracy in targeting the victims and the motive behind such killings.
- (d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killings
- (e) To make recommendations to prevent recurrence of such killings; and .
- (f) Any other matter related to or relevant to the purpose of this inquiry;”

The Commission was ably assisted by Dr.Y.K.Phukan Sr. Advocate and Shri Diganta Gogoi, Advocate, as Senior and Junior counsel, for the Commission, respectively; and Shri P.K. Muusahari, Senior Govt. Advocate, Assam, and Shri Dhanesh Das, Junior Govt. Advocate and Additional Public Prosecutor, Assam..

PART. I. INTRODUCTORY.

(To be read in continuation of the Part I of the Report on the First Group)

25. Confirmation of the earlier findings; All the findings arrived at on the basis of the earlier First and Second Groups of cases have been fully confirmed by the evidence in this Third Group of fifteen cases. Almost all of the common characteristics in this Third Group of fifteen cases are almost the same as those of the First Group of Seven cases, and, the Second Group of eight cases. considered with their evidence. The additional characteristics found in this Third Group of fifteen cases are: 1. The parties boldly naming of some individual Sulfas as perpetrators in some of these cases; 2. The then Police authorities openly constituting some of the Sulfas an extra-Constitutional

authorities for killings, in the process of Ulfocide, that is, deliberate killing of Ulfas and their families and relatives, thus executing them for their "status offences" of belonging to ULFA and ULFA-related families, without their committing any crime or offence, and pursuant to remote-orchestration from State Home Minister and using the concerned Sulfas as political policemen; and returning some of the cases in F.R.(Final Report) without finding any clues, and 3. Fake Encounters, partly because there was no encounter at all, or because the Police-SULFA nexus could not have exercised Police powers. It may also be noted that this Third Group of ten cases also reveal some individual Sulfas being boldly named by respective parties in course of evidence, thereby fully confirming the unholy nexus between the then concerned Police authorities and the concerned Sulfas, in secrecy, by the Home Minister, in flagrant violation of their Constitutional, Legal and Human Rights. There is enough evidence to show that the then Home Minister was at the helm of these extra-Constitutional killings. In all the cases where the then Home Minister's name have been directly mentioned, Shri Prafulla Kumar Mahanta has been evading opportunities to cross-examine the witnesses by various pretexts and untenable pleas of this Commission being without jurisdiction, a plea which has been rejected by this Commission on numerous occasions. Shri Prafulla Kumar Mahanta made statements before the Assam Legislative Assembly to the effect that the case of Shri Ananta Kalita of Hajo (First Group) without even going through his medical reports and his statement before the Magistrate u/s. 164 Cr.P.C.. In Tezpur Rajesh Misra and Rajib Koch's case Shri Prafulla Kumar Mahanta made a statement in the Assam Legislative Assembly to the effect that it was a mere land dispute case, though all the supposed parties denied before this Commission that they were in any manner involved in any land dispute. In the evidence of Shri Dimba Rajkonwar's case of Dibrugarh, there was a news item saying that Shri Prafulla Kumar Mahanta sent a Secret Killer's squad to Lakhimpur, but on complaint from his party colleagues that operation of the secret killer's squad would affect the political prospects of A,G,P, in Lakhimpur, he ordered the squad to cross over to Dibrugarh where several secret killings took place immediately thereafter. Shri P.K.Mahanta denied the truth of the news item and said that he sent a contradiction which was not published by the news paper 'Agradoot', and was asked to produce a copy, and a copy was produced, but no contradiction was published even then. Shri Prafulla Kumar Mahanta said that he had nothing to do with the Unified Command Structure and could not do anything in secret killing cases where Police-Sulfa nexus were alleged to have been involved. The numerous (secret) killing instances in the State of Assam during 1998-2001 period showed, as if, the Ulfocide was the dictat of the Home Minister of the State, and as if all the Ulfas, members of their families, and even their relatives have already forfeited their right to life and liberty hitherto conferred on them by the Constitution of India.

26. The Unified Command Structure. In paras 14 and 15 some aspects of the Unified Command Structure were discussed. In individual cases under term (e) it was recommended that the Unified Command Structure be gradually dismantled on restoration of normalcy in Assam. Mr. Prafulla Kumar Mahanta has submitted elsewhere that this Commission has no jurisdiction to deal with the Unified Command Structure. Be that as it may, it is considered appropriate to suggest some reasons for the recommendation. The attitudinal and orientational differences between the Police and the Army are patent, the former to maintain law and order and control crimes, while the latter is to combat in war against enemies. For these differences the two together may not always suit the same purpose. The Army is oriented for combat against the enemy and its success is in the unrestrained killing and destruction of the enemy. The law of war, and not that of peace time is the rule. At best they

claim to fight with iron fists in velvet gloves. The Army is normally confined to barracks in cantonments. It is said that the Army of the Great Czengiz Khan was the most efficient as they were never allowed to mix with the civilians, so that they could not imbibe their softness. Compared to that the Police has to control crimes and criminals and maintain law and order within the four corners of the Constitution and the laws of the country. Police is to deal with the citizens of the country and protect their life and property. To make the police and the Army work together in a civil situation may result in policisation of the army, on the one hand, and the militarisation of the police, on the other. The result will be that we have a militarised police, and the policised military. Indeed in almost all the cases under reference we found evidence of frequent visits of army men to the Ulfa families, and during some of the so called "encounters." There has also been allegation of Constitutional violation of exposing the civil population, women and children, to the harassment of the military with consequent reign of terror to the civil populace. Either way it may be undesirable to continue it for long and to turn it into a pattern of civil administration. This is not the view of this Commission alone.

In the Assam Tribune of Thursday, December 21, 2006, Mr.S.Kabilan, the Chief Secretary, Assam, and ex-officio Head of the Strategy Group of the Unified Command Structure for 26 months, a day before his retirement, expressed the "need for an orientation programme" for the Army personnel before they are deployed for counter-insurgency operations. He said that "using the Army for internal security is a difficult task and it is also unfair to the Army" and that "the main job of the Army is to act against the enemies of the country, but here they are forced to operate against the people of the country" He said "we are forced to use the Army because of shortage of force to deal with the situation, but the Army men are trained to operate against the enemy and not against its own people."

[It is appropriate to mention here that the application of the Unified Command Structure in Assam is not at all in consonance with the Constitution of India inasmuch as the insurgents in Kashmit are foreign aggressors, while the Ulfa men in Assam are our own children/citizens; misguided may they be, but they have not forfeited their Fundamental right to life and liberty given to every citizen by the Constitution of India. Using the Army to shoot them down at sight, as have, in effect, been seen, is violative of their fundamental right to life and liberty, given them by the Constitution of India. To kill them in fake encounters is a fraud on the Constitution of India. Such cases may be liable to be treated as cold-blooded murders. The numerous atrocities on the innocent population of the areas, as reported, can hardly be defended as acts of necessity on the part of the Army, operating under the Unified Command Structure. The civil population of the disturbed area cannot be treated as to have been at war with the Government, and to treat them as if they have been at war, is palpably objectionable. The recent taking over of the Chairmanship of the Strategy Group of the Unified Command Structure, by the Hon'ble Chief Minister of Assam himself, is bound to improve things considerably, but the system woven into the fabric of civil administration may still result in violations of human rights in operating the Structure. For example, recently, it has been reported that the Army has been assisted by some Sulfamen in its anti-insurgency operations, and this may lead to complications. Already there have been allegations of some Sulfas actively and openly moving with the army men and police, in the hope of being endowed with favours is rampant. Therefore, ultimate dismantling may be the best solution on restoration of normalcy and ending of the disturbance. This recommendation is given, as sought, to prevent recurrence of such killings.]

Kabilan

27. The Army Districts. In para 15 we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; ammunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State

of their fundamental rights to life and liberty. Any violation of such rights under such provisions would not countenance violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitins and/or some Ulfa related papers are put near the dead bodies. obviously for post mortem justification of the killings This will not stand on the way of the spade being called a spade...

28. Right of Private Defence and Encounter.. The English law excuses a person who has been forced to commit an offence by fear of death or of grievous bodily harm, except in cases of treason or homicide. In India sections 96 & 97 pf the Indian Penal Code provide: S.96 "Things done in private defence. Nothing is an offence which is done in exercise of the right of private defence"

S. 97. "The right of private defence of the body and property. Every person has a right, subject to the restrictions contained in section 99, to defend- first, his own body and body of any other person against any offence affecting the human body; Secondly, the property whether movable or immovable of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass"

S.99. Acts against which there is no right of private defence. - "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant... There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by the direction of a public servant. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities Extent to which the right of private defence may be extended. The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence." The two Explanations are not applicable to this case.

More than two centuries ago, Blackstone, the best known of the expositors of the English common law, taught that "all homicide is malicious, and of course, amounts to murder, unless justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation". By the early common law, justification for homicide extended only to acts done in execution of the law, such as homicides in effecting arrests and preventing forcible felonies, and homicides committed in self-defense were only excusable. The distinction between justifiable and excusable homicide was important because in the latter case the slayer, considered to be not wholly free from blame, suffered a forfeiture of his goods. (F. Wharton, Homicide § 3 at 211) However, with the passage of 24 Henry VIII, ch. 5 (1532), the basis of justification was enlarged, and the distinction has largely disappeared. More usually the terms are used interchangeably, each denoting a legally non-punishable act, entitling the accused to an acquittal. Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's [n. 36] time, and in the case before us the doctrine is invoked in its purest form. But "[t]he law of self defense is a law of necessity;" the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly. [n. 40] The "necessity must bear all semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable as excusable." Hinged on the exigencies of self-preservation, the doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of

the arena of self-help in the settlement of potentially fatal personal conflicts. So it is that necessity is the pervasive theme of the well defined conditions which the law imposes on the right to kill or maim in self-defence. There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. [p. 1230] The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances. It is clear that no less than a concurrence of these elements will suffice.

Thus, the right of private defence arises on the moment of reasonable apprehension of death or grievous hurt, and not otherwise. The imminence of the danger, and reasonableness of the apprehension, and the proof thereof have to be considered. Glanville Williams discussing how imminent must be the danger says: "It is sometimes thought that defence is allowed only against immediately threatened violence. Clearly force may not be used to meet a threat of violence in the future, because it cannot be said that the force is necessary at the present moment. But if there is a present hostile demonstration that violence is about to be used the defender need not wait till his assailant comes within striking distance, or put his finger on the trigger. To this extent the "pre-emptive strike" is lawful. One can imagine a case where the attacker is going off to summon reinforcements and the defender realises that if he does not shoot him now, he will be lost; in such circumstances shooting should be justified." Imminence is implied. It is not reasonable to use force until the occasion arises. Discussing the question whether a mistaken belief would be enough, the author says: "Nearly all the authorities require it to be reasonable. They take the "objective" view that the defendant's honest belief is no defence, to the charge if it was unreasonably arrived at. The right of private defence or self defence has to be exercised reasonably and even circumspectively, particularly when its result is the death of a person. In fact, the right is, in a sense, denied when it results in death of the person against whom it has been exercised. Glanville Williams, in his Textbook of Criminal Law, asks. "If two men fight, and one says he was acting in self-defence, is not there a formidable problem of proof? Yes, and, in particular, a person kills in what he conceives to appear to be self defence is subject to the serious risk that the emergency will not appear to the jury in the same light that it appeared to him. When looking back at the incident, the fact likely to make the situation impression that a man has been killed, the transitory fear felt by the accused person has left no memorial to compare with the tragic reality of the corpse. If there is a survivor of the incident on the other side, his account of what has happened is likely to differ essentially from that of the accused. Even impartial spectators are unreliable witnesses to a sudden affray that is over in a few minutes or seconds. When the issue is one of self-defence, everything depends on which side was the aggressor, and the temporal order of events is therefore of high importance. But, experience indicates that it is difficult to establish by oral evidence. In particular, witnesses have been shown to have been unable to recall words with accuracy. Hence, there arise two dangers in the administration of the law, unjust conviction and unwarranted acquittal after a concocted defence. Of the two risks, the former has to be taken the more seriously, and for this reason the law casts the burden of negating the defence of self-defence upon the prosecution, only the evidential burden being rested on the defendant. If the case is clearly one of self defence, the Judge will not even allow the case to go to the jury." (P. 449)..

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In the context of the (secret) killing cases it would be necessary to ascertain the correct attitudinal/legal approach to the killing of the victim on the part of the army men/policemen. To be precise, seeing one person, whether he was to kill him or to capture him, which he could do even by chasing and if required maiming and disabling him. In other words, did the victim already has reached the end to his right to life and liberty, so that he could be killed or

shot at sight? If the person was already known for certain to have been an Ulfa, could he be shot and killed, and if it was not certain whether he was an Ulfa or not, was it the killer's duty first to ascertain and then deal with him accordingly? Usually, in this part of the country, what is being seen is that the army men, and the militarised policemen, perhaps for being in the same Unified Command Structure, assume themselves to have been required or authorised to kill the suspected Ulfas/ extremists straightway.. Very often some make-belief posthumous evidence is laid near the dead body to show or prove that the victim was an Ulfa or in Ulfa mission. This perhaps shows in what casual manner the human right to life and liberty is being dealt with/ defrauded by these some State agencies personnel. sometimes. There is evidence to show that (credit) of killing of boys who are (suspected) Ulfas and/or who are garbed as Ulfas is often related to the officer's prospect of promotion or favourable posting, or Sulfa's encounter specialist's expected favour from the army or police hierarchy. These questions have to be considered in the prevailing background situations, namely, the state of Assam has been declared a disturbed area under the Assam Disturbed Areas Act/ The Armed Forces (Assam & Manipur) Special Powers Act, 1958., and the position that once a disturbed area, always a disturbed area. in the State of Assam. .

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.. The two Explanations are not applicable to this case. Thus, the right of private defence arises on the moment of reasonable apprehension of death or grievous hurt and not otherwise. The imminence of the danger, and reasonableness of the apprehension, and the proof thereof have to be considered.. Glanville Williams discussing how imminent must be the danger says "It is sometimes thought that defence is allowed only against immediately threatened violence. Clearly force may not be used to meet a threat of violence in the future, because it cannot be said that the force is necessary at the present moment. But if there is a present hostile demonstration that violence is about to be used the defender need not wait till his assailant comes within striking distance, or put his finger on the trigger. To this extent the "pre-emptive strike" is lawful. One can imagine a case where the attacker is going off to summon reinforcements and the defender realises that if he does not shoot him now, he will be lost; in such circumstances shooting should be justified." Imminence is implied. It is not reasonable to use force until the occasion arises. Discussing the question whether a mistaken belief would be enough, the author says: ' Nearly all the authorities require it to be reasonable. They take the "objective" view that the defendant's honest belief is no defence. to the charge if it was unreasonably arrived at.. seems to have played some part in some of the killings under enquiry. There has been indication in some of the cases that the victims failed to satisfy monetary demands rightly or wrongly made

29 Judicial Analysis.. On judicial analysis, I really shudder in finding that the series of Ulfocidal open/secret killings, that have been enquired into, throughout the State, during 1998 to 2001, have been consistent with a then wreckful Home Ministry's State police, in unholy nexus with selected, armed, and protected groups of Sulfas, despite the deployed armed forces and other para military forces of the Union, in the arrangement of the Unified Command Structure, in its three formations, and political administration, in the then State Home Ministry and, militarisation of the State police and the policisation of the deployed army men, and para military forces, acclimatised by Gubernatorial militarisation, to have contributed immensely towards the killings, resulting in utter degradation of the democratic values and total oblivion of the republican ideals in the State at that time. It may be blasphemous to say that the creation of a group of encounter specialists with exuberance of youth and political patronage, proliferated fake encounters which have proved to be the vanishing point of human, Constitutional, and fundamental rights of Indian citizens in Assam,

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to life and liberties, and ending in the disaster of Republicanism in this part of the country. Indeed, exposing the innocent population of the State, including the women and children, to the ruthless military operations, in the name of insurgency, in flagrant violation of the Constitutional protection, and the brutal killings of innocent men and women, playing tricks, and garbing them as ULfas, or other extremists, is at the height of State Ulfocide through remote orchaestration. All these have to be avoided for ushering in freedom, peace, progress and prosperity in the State of Assam. to prevent recurrence of such killings..

PART. 2. INDIVIDUAL CASES

(16)

SHRI NRIPEN DOWARAH AND SHRI DEEP BORAH KILLING CASE

Simaluguri P.S.Case Nos. 107 & 108/98

Date of Occurrence 6.10.98

By this Commission's order dated 13.11.2006 by virtue of the authority conferred on it by the Government of Assam's Notification Nos. No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No. No.PLA 331/2005/1 dated 22.8.2995, after hearing the applicant and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case. the following terms of reference, and any other related and relevant matters with recommendations, if any, namely:

- “(a) Circumstances , in each case, leading to the killing of its victim(s).
- (b) Identity of the killer(s) and accomplice(s), if any.
- (c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s)
- (d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killings
- (e)To make recommendations to prevent recurrence of such killing(s)
- (f) Any other matter related to or relevant to the purpose of this inquiry;”

(A) Circumstances leading to the killing of Shri Nripen Dowarah and Deep Borah

In his affidavit dated 25.9.1006 Shri Bhupen Dowarah, son of Shri Giridhar Dowarah of No.1 Khanamukh Maut Gaon, District Sibsagar, stated that deceased Nripen Dowarah was his elder brother and at the time of his death he was aged about 27 years. From the co-villagers they could know that on 6.10.98 some unknown miscreants forcibly took him away from Majgaon Chapori Shuba area. They reported the matter to the Gaurisagar Police Station, but could not make any enquiry. Next day on 7.10.98 they learnt from the co-villagers that at Geleki area two dead bodies were found; and enquiring there it was learnt that the two dead bodies were sent to the Sibsagar Civil Hospital at

Joysagar for post mortem examination; and coming there and after close examination one of the dead bodies was identified as that of my elder brother Shri Nripen Dowarah. How, where and under what circumstances his brother was killed were not known to him. The dead body was in half naked condition and on his neck a cut injury with sharp cutting weapon was noticed. On 8.10.98 some police officials with an Executive Magistrate handed over the dead body at our house and the body was cremated according to our religion. It may be noted that the dead body of Nripen was supposed to have been found at Lakwa Chariali and not at Geleki. Another dead body was found at Salapathar on the same day. Whether that dead body was the other one or not that can be ascertained only from Simaluguri P.S. Case No. 108/98. From the records of that other case it appears that the investigation proceeded on the possibility of the two dead bodies having been from the same incident. However, the post-mortem report of that case being not presently available, the similarity of their modus operandii could not be ascertained.

The post mortem report of Shri Nripen Duwarah records:

Fair built young man with rigor mortis present. Blood stain seen over face and neck and chest and scalp (Occipital region.)

A cut injury is seen over the upper neck right side extends below the right ear (behind) to the upper trachea in front. The size of the injury 6"x4"x4" Right extreme and internal cardinal vessels are along the muscle over the right side of the neck are completely severed along the injury. muscles are blood stained. Trachea is opened in its upper part.

The injury is ante mortem in nature caused by sharp weapon. (From the injuries there is no doubt that the killers used sharp cutting weapon aimed at the easiest part of the body)

It may be recalled that the dead body that was dumped by the other Tatamobile at Chalapathar was ultimately recognised to have been that of Shri Deep Borah. son of Shri Jogeswar Borah of No. 1 Hatiamora Sivasagar village P.S, Dolhat, North Lakhimpur, District Lakhimpur, in the Simaluguri P.S. Case No.108/98. In fact the unidentified dead body was disposed of, preserving the clothes and taking photographs. The relatives could not identify by the clothes but could identify by the photographs. The post mortem report of Shri Deep Borah is not available in the Case diary. The Inquest report of submitted by Shri Dipak Bhuyan, Executive Magistrate, Nazira. to the S.D.O., Nazira on 7.10.98, around 10 A.M. says:

"The unidentified dead body whose whose height was about 5 feet 5 inches and aged about 24 years lying upwaedly in the diirection of East-West by the side of Chalapathar road near Chalapathar Reserve. The deceased has short black hairs, thin mustach. The nose of the deceased was sharp and the mouth was half opened. The colour of the skin was white. The deceased was wearing a black coloured shirt and and trouser The whole face was covered by blood The eyes of the deceased was completely closed When the shirt and trousers of the deceased were put off, no injury was found No shoes were worn by the deceased. when the dead body was turned around, no injury was found. on hia head and neck. But three burning black spots were found on the left of his back side One severe injury strip was found on the back side. No other injury spot was found on his foot. The deceased succumbed to serious external and internal injuries made by hard mattel on his back side and on his face."

(B) The identity of the killers, and their accomplices, if any

The killing of Shri Nripen Dowarah and Shri Deep Borah was secret both as to place of killing and as to the identity of the killers and their accomplices if any. The identity of the killers and their accomplices have to be determined on basis of the evidence on record. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. We discussed the meaning of "secret" in para 7 of the Introductory Part I.(First Report) .

P.W.1 Shri Bhupen Dowarah repeated what he said in his affidavit dated 22.9.06. Shri Nripen Dowarah at the time of his death was aged 27 years; and on 6.10.98 they came to know from some of their co-villagers that some unknown youths forcibly took him away from Majgaon Chapori Chuk. Though they reported the matter to the Gaurisagar P.S. nothing was known from them.. On 7.10.98 they learnt from the villagers that at Geleki area two dead bodies were found. Enquiring at Geleki they learnt that the two dead bodies were sent to the Sibsagar Civil Hospital for post mortem examination. Immediately they came to the Civil Hospital and identified one of them to be of their elder brother. How, where and under what circumstances he died was not known to him. The dead body was in almost naked condition and on his neck a deep cut injury was seen. Next day on 8.10.98 certain police officials, with one Magistrate brought and handed over the dead body to them at their house; and its cremation was completed according to religious custom. In his deposition the deponent added that Majgaon Chaporichuk would be about 5 k.m.s from their house and they had to pass through that place to go to the market, the national highway and other places. He was told by some villagers that his brother Nripen was forcibly taken away by the miscreants in a white Maruti Gypsy.; and that the assailants covered their faces with black cloths. On 7.10. 98 his brother Nilamani Dowarah went and met one Addl. Dy Commissioner at Sibsagar and enquired about his brother Nripen and that the Addl Dy Commissioner telephoned to several persons, and yet he could not say anything to him about his brother Nripen Dowarah. However, when his brother was coming from the Sibsagar Court, one of their co-villagers informed his brother Sabin Dowarah that Nripen's dead body was found lying in Lakwa area. Someone brought the dead body to the Sibsagar Civil Hospital at Joysagar where it was identified by his brother Nilamani. It was not known which version was to be accepted. It might be that very night the two dead bodies were shifted to Lakwa and Salapathar and thence to the Civil Hospital. At post mortem rigor mortis was present in the body.

The original case records of Simaluguri P.S. Case No. 10898 u/s. 302 I.P.C., being the Shri Deep Borah Killing case shows, the deceased was that the dead body of the deceased Deep Bora @ Padmeswar Borah S/O Shri Jogeswar Borah of No. 1 Hatiyamora, Sivasagar P.S. Dolohat, North Lakhimpur, District Lakhimpur.. The Case Diary from pages 1 to 37 shows as many C.D.s. The concerned officers were the same as those of the Simaluguri P.S. Case No. 107/98. On examination of the papers, it appears that on some enquiry conducted by the Garisagar P.S. and on the signal circulated by Simaluguri P.S. to all police stations and outposts of the State giving details of the dead body,. At page 3 of the case diary is a statement of one Noin Moni Saikia S/o. Late Sarat Chandra Saikia of Gandhalipar, P.O. Naoboisa, P.S. Naoboisa, district North Lakhimpur,

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who was a peon of the Madhya Naoboisa Panchayat, on 18.10.98 said that on the previous day his brother-in-law Shri Jogeswar Borah came and said that someone killed his nephew Shri Deep Bora and kept the dead body at some place of Sibsagar and it is now in Sibsagar Hospital and he should go bring it. Accordingly I came and saw the clothes but could not identify. Then, coming to Lakwa outpost he saw the photographs from which he could and he identified his nephew Deep Borah. He said that he did not suspect anyone, and that from his (Deep's) father he heard that Deep was an Ulfas.

It may be observed that the statement that Deep was an Ulfas appears to be suspicious, as it was not likely to have been made at identification otherwise than in answer to a question put to him by someone at the outpost. However, no clue was found in the case; and it is intimated by the S.P. Sivasagar district that case has already been returned in F.R. No. 51 dated 30.11.2002. Due to paucity of time no witness could separately be examined in this case, but they were examined in Case N. 107/98 on the same incident resulting in the two deaths.

According to the witness Nripen Duwara was a simple agriculturist having no enemies; and it was not known why the miscreants killed him that way and threw his dead body at Lakwa was a mystery. The witness said that as such killings were committed by Ulfas at that time, they also suspected that the death of his brother was also caused by secret killers who were the Ulfas. People said that this killing was caused under the leadership of Jayanta Hazarika as all the people talked about him at that time; and that from news papers he had learnt that he (Jayanta) had by then become an M.L.A. In cross, the witness said that Nripen left his studies and was not a college student. He heard from the public around that as the atrocities and killings were done by Ulfas, at the instance of the then State Govt. to suppress those Ulfas who were demanding Sovereignty of Assam and also other people who were helping their cause. He also thought that the then State Govt was using Ulfas to suppress the Ulfas, and the police cooperated with them, otherwise how such killings could be possible. Witness added that as in a family the head is taken to have known the activity of the family, similarly the then Chief Minister Shri P.K. Mahanta must have had knowledge and support to the killings and without his knowledge this could not have been done. He added that about a year after the incident Shri Pradeep Hazarika the then Transport Minister came to their house to pay condolences, as their relationship with him was not bad, he came after a long time, his (Bhupen's) father did not talk to him.

P.W. 2 Shri Nilamani Dowarah, another brother of the deceased, corroborated his brother Bhupen Dowarah in all respects. Asked as to why no ejahar was lodged in this case, he said: "as they believed that the police administration itself was behind the killing, therefore, it was futile to lodge any ejahar with the police. We lost all faith in the administration, more so, in spite of large number of secret killing cases, not a single culprit has been brought to book. He believed that had the Govt. and the police not been behind the killings, at least some Ulfas should have been caught.

N.W. 1 Shri Puna Gogoi was the O.C. of Simaluguri P.S. on 6.1.98. On 7.1.98 at about 7 a.m. he received an information from I/C Lakwa outpost to the effect that a dead body with its neck cut was lying near the gate of Shri Uma Rajkonwar near the station chariali at Lakwa; and immediately he talked to the C.I. (Circle Inspector) at his office at Nazira who said he would be coming and asked the O.C. to inform higher authorities; and so he informed the S.D.P.O and S.D.O. (Civil) Nazira requesting the latter to depute a Magistrate, as also the Addl S.P. Sibsagar who asked the O.C. to keep everything ready until his arrival to proceed to the place of occurrence. Immediately on arrival of the

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officers, including Shri Rajib Bhuyan, Executive Magistrate, with them the O.C. proceeded to Lakwa outpost, and taking staff, to Station Chariali and found the dead body lying near the gate of Shri Uma Rajkonwar to the left of the Station road crossing. They examined the place and the body thoroughly. Meanwhile the Addl. S.P. (H.Q.) Sibsagar arrived. The Executive Magistrate Shri Rajib Bhuyan performed the inquest over the dead body and found and recorded the neck cut injury, but found no other injury. The dead body was then escorted by two constables of Lakwa outpost to the Sibsagar Civil Hospital at Joysagar..

The dead body was lying in front of one Prasanta Gogoi's gate, but neither he nor any of the neighbouring villagers could say wherefrom the deadbody was brought and by whom it was dropped there. Prasanta Kumar Gogoi lodged an ejhar at about 12.20 p.m on the same day at the place of occurrence of the incident as the body was in front of his gate. The evidence showed that at the nearby Shri Uma Rajkonwar's house, there was a night guard party, and at that time two of them were on duty and one of them, when examined, said that at about 3.30 a.m. two Tatamobiles came one after another and while one went towards the ONGC, the other stopped near the gate where the dead body was found and looked like unloading something which he could not see because the spot was about 250 metres from the sentry post near Shri Uma Rajkonwar's gate and the light was insufficient. The Tatamobile proceeded towards the ONGC. colony. After about 10/15 minutes he saw one Tatamobile coming from ONGC side and proceeding towards Simaluguri side, but he could not say whether it was one of the two that went to OMGC side earlier. Meanwhile information came of another dead body having been found ahead of the road at Manumara Reserve, Salapathar, and the police officers had to proceed thereto, but that case (108/98) has not been before this Commission and hence no reference is made thereto.

After the case was registered, Shri Rajib Saikia, I/C Lakwa outpost being on leave that day, the investigation was entrusted to A.S.I. Shri Jawahar Lal Barua, but same day it was taken over by the I/C Shri Rajib Saikia. The rest of the evidence, no doubt, showed promptness on the part of the O.C. and the I.O. in taking investigative steps, but are in no way helpful; in finding out any particulars of the Tatamobiles and the killing and of the culprits. The O.C. examined the dead body thoroughly, and checked the pockets of shirt and pant in the wearing of the dead body, but did not find anything, and his impression was that the killing was done elsewhere and the dead body was brought and dumped there by the Tatamobile. On enquiry he was told by Gaurisagar police that they enquired of the antecedents of the deceased and that the relatives told them that he left their house four years back and that there was no incident there. This, we shall instantly find, is contrary to what the relatives maintain on oath. There is also doubt as to the procedure followed in sending an officer to Khanamukh, Bhagamukh and again to Khanamukh No, 1 Maut Gaon and getting the story. There was no missing report earlier. This also throws doubt as to the sincerity of Gaurisagar P.S. in investigating the case, and its failure to register a case even after knowing that the boy's house was under their jurisdiction. All these appear to have been done to show that the boy Nripen was an ULFA and could be killed, as he was killed. The story of the two dead bodies having been found at Geleki area was not investigated at all. All these go to show some knowledge of police in the two killings. The then Addl S.P.(HQ) could throw some light in this regard.

N.W. 2 Shti Jawaharlal Barua, A.S.I. of Lakwa outpost was functioning as I/C Lakwa on 7.10.98 and he corroborates the O.C. in material particulars. The Constable on duty at Shri Uma Rajkonwar's gate Shri Krishna Gogoi saw two Tatamobiles coming

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from Simaluguri Side one after another, the first one stopping and in front of Shri Prasanta Kumar Gogoi's gate, a little ahead of the Lakwa Station Chariali, about 250 meters from the sentry post and so he did not see properly in insufficient light. The place where the other dead body was found would be about 4/5 k.m.s ahead by the same Rajgarh road. He did not remember the particulars of the other dead body. It was the evidence in Dimba Rajkonwar's case that a dead body was laid at the gate of Shri Uma Rajkonwar. Might be this was also planned to be put there, but because of the presence of the sentry it could not be placed there and had to be placed a little ahead. There was no reason shown in evidence why it should have been placed near Shri Prasanta Kumar Gogoi's gate. The particulars of the other dead body in respect of which the Simaluguri P.S. Case No. 108/98 was registered may throw some more light. The possibility of the two dead bodies alleged to have been found in the Geleki area having been brought by the two Tatamobiles could not be ruled out, both the Tatamobiles having been seen coming from Simaluguri side.

N.W. 3 Shri Rajiv Kumar Saikia, I/C Lakwa outpost returned and resumed his Charge and investigation of the case between 11 and 12 noon on the date of occurrence. He found that there were two cases and the dead body of the first was a little ahead of the Lakwa Chariali towards the ONGC and the other dead body was found a little later at Salapathar in Manumara Reserve area which also fell under Lakwa outpost. and the C.I., S.D.O. and a Magistrate had already gone there. He sent the FIR lodged by Prasanta Kumar Gogoi to Simaluguri P.S. and examined some of Prasanta's neighbours, as the dead body was already sent. One of the escorting constable returned from Joysagar Civil hospital and informed that the dead body was already identified by relatives from Khanamukh under Gaurisagar P.S. The I.O. consulted his higher officers namely, O.C. Simaluguri P.S., the C.I., Nazira, the S.D.P.O. and the Addl S.P (HQ) Sibsagar. He examined the Constable on guard duty at Shri Uma Rajkonwar's gate who said that two Tata Mobiles came, one after another, one stopped near Prasanta Gogoi's gate for about 5 minutes, while the other proceeded straight towards ONGC, He said vehicles used to stop there for the drivers to satisfy call of nature. Thereafter the I/C went on leave for 15 days, later extended to 3 months and thereafter left the outpost on transfer. In cross it was said that there was no record to show that Shri Nripen Dowarah (the identified body) was an Ulfa and no step was taken to locate and apprehend the Tatamobile. These were not traced. No finger prints were preserved, no checking records maintained, Police circulated an incredible W.T. message that the boy belonged to Khanamukh and was missing for 3/4 years without proper authentication, as that was contrary to what was stated on oath by his relatives. Witness denied the suggestion that police itself in collaboration with Sulfa killed the boy and dumped it near Shri Uma Rajkonwar's gate to annoy him and made an eye wash of the investigation of the case, no supervisor's npte was issued by any high officers of police.

N.W. 6 Shri Prabhat Phukan was entrusted with the investigation of the case by the O.C. on 10.3.99. Going through it he found that the case was without any clue. He therefore, engaged sources. The C.I. Nazira also issued some instructions of routine nature. It was accepted that the boy was killed elsewhere and the body was dumped at Lakwa chariali. Even after carrying out all the instruction, the position did not improve and the clue was still not there. However, the D.T.O. was not consulted about the vehicle. The witness also investigated the Simaluguri P.S. case No. 108/98, and, according to him, the two cases are similar, but it was not clear whether both the bodies were of the same killing case. as the two Tatamobiles came one after another, one stopped at Lakwa

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crossing and the other proceeded towards ONGC side and after about 15 minutes one Tatamobile was seen going from ONGC side to Sinaluguri side. The witnesses avoided the question saying without records they would not venture a reply. Witness did not suspect any Sulfa and did not think of amalgamating the two cases. He denied the suggestion that the killing was by Police-Sulfa nexus at the instance of high authorities and the investigation was for hushing it up.

N.W. 4 Shri Gopal Bora was Second Officer of Gaurisagar P.S. on 6.6.10.98 and came to know about this case from the W.T. message circulated by the Gaurisagar P.S. which he was entrusted to investigate. He went to Khanamukh, maut Gaonburha, interrogated some people there, but none knew that name. Next he went to Bhagamukh Mising Gaon on 2.8.98 and carried on the same enquiry in vain. Then he enquired in the Jamuguri area with no result. On 7.12.98 with A.S.I. S. Chutia and A.P.B.N. personnel he again went to Khanamukh No. 1 Mout Gaon and there Shri Giridhar Dowarah said that his son Nripen Dowara left his house 4 years back and he did not know his whereabouts and what happened to him, and that from news papers he learnt that his son was killed and his body was found at Lakwa. Then the witness informed him that the dead body found at Lakwa had been brought to the Sibsagar Civil Hospital at Joysagar and he could go and identify his son there and coming back from Bhagamukh the witness reported to the Gaurisagar P.S. With respect to the police authority of Gaurisagar P.S. this story is unrealistic and is at variance with what was stated by Bhupen Dowarah in his affidavit and evidence. that Nripen was forcibly taken away by the killers from Majgaon Chaporichuk the previous day; and it is incongruous with what was said by Simaluguri Police constable. This was clearly an attempt to garb Nripen as ULFA. There was no record of Nripen being ULFA at the Gaurisagar P.S. Shri Giridhar Dowara, or for that matter the Gaurisagar P.S. did not send any missing news for publication. No case was registered at the Gaurisagar P.S. on the missing report. No enquiry was made of the Tatamobile vehicle that dropped the dead body at Lakwa.

N.W. 5 Shri Ashim Bora joined police service on 10.7.2000 and had to deal with this case No. 107/98 as an Attached Officer of Simaluguri P.S on 5.9.2004 after its first F.R. was rejected and had to be reinvestigated. He repeated the investigation and re-examined the same witnesses, but there was mere repetition and did not find any clue; and accordingly he consulted the O.C. and the C.I. and he submitted the F.R. on 30.9.2004 and the same was accepted by SDJM, Sibsagar on 2.1.12.2004. A notice dated 30.9.2004 was issued to the complainant Shri Prasanta Gogoi. From the report of the boy being missing for 3 / 4 years police concluded that he joined the ULFA, but there was no record at the P.S. showing him as ULFA. Contemporary ULFA-SULFA conflict was known, yet no SULFA was suspected or examined.

From the modus operandi of the case, namely forcibly lifting of the boy from one place and dead body thrown at another place, and the nature and position of the deep neck cut injury, it belongs to the same category of other cases in Sibsagar district. This is indicative of an organised group of secret killers expert in killing by sword/ dao or any other sharp cutting weapon, though in some of them shooting by sophisticated firearms were also there. It was also to be noted that forcible lifting of unsuspecting boys into Maruti Gypsy vehicles taking them to a place and cutting and shooting them dead, and then carrying the dead bodies by road in motor vehicles to a distance and drop those at places would not be possible unless the police were conniving or even being in league with the police protected killers. The identity of the killers have, therefore, to be reasonably confined to the protected Police-Sulfa nexus of Sibsagar Town and their accomplices/

facilitators almost giving an idea of State sponsornrg. the killing of Nripen Dowarah, garbing him as ULFA;

Regarding the victim in Simaluguri P.S. case No. 108/98 the investigation was mainly directed towards finding out the identity of the dead body. All the witnesses of Lakowa and Salapathar could not bring any clue. Persons from the Khanamukh and Bhagamukh areas did not establish ay identity. The inhabitants of the No. 1 Hatiamora Sivasagar village must have originallu migrated from Sibsagar district, as the name of the village itself signifies. Might be in that relationship Deep Borah might have come to Sibsagar Khanamukh Bhagamukh area and unfortunately involved in the incident.

From the above evidence, particularly the nature of kidnapping, injuries on the dead bodies and the carrying to and throwing the dead bodies at two different places by the two Tatamobiles, as seen by the witnesses examined, the identity of the killers may reasonably be confined to the then Sivasagar District Police administration and the organised and police protected Sulfa group of Sivasagar The recorded supposed statements of the fathers of the two victim boys may be indicative of the efforts of the police administration to garb the boys as Ulfas. Unless the killings were claimed to have been by the police, the boys' being Ulfas or not was immaterial, because others have no right to kill any boy even if one was an Ulfa.

(C)Whether there was any conspiracy in targeting Nripen Dowerah and Deep Borah and the motive behind such killing.

This term is replied in two parts, namely, 1. Conspiracy in targeting, and 2. Motive behind killing.

I. Conspiracy in Targeting the Victim. Conspiracy in the context of the instant inquiry, will mean criminal conspiracy which is defined in Section 126A of IPC as follows:.

“When two or more persons agree to do or cause to be done-

(1) An illegal Act, or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing. As defined in Section 107 of the Indian Penal Code (IPC)

“ A person abets the doing of a thing . who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing. if an act or illegal omission takes place in pursuance of that conspiracy , and in order to the doing of that thing ; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explation -1. A person who, by wilful misrepresentation, or by wilful concealment of a material fact whicsibsagar district he is bound to disclose, voluntarily causes or procures. or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

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Explanation -2 Whoever either prior to or at the the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act".

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the killing of Nripen Dowarah has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators? The evidence of forcible taking away and the fincing of the dead body at Lakwa after he was killed elsewhere during the night and the dead body being carried in the Tatamobile is on record. The persons who participated in the act of actual killing on the fateful night, must have been the same or their agents and accomplices and as such, there could be no other answer than that there was criminal conspiracy in the killing of Nripen Dowarah. There is evidence in cases from Sibsagar to show that some SULFAs in Sibsagar were enjoying protection from the police. This may have disabled the police from taking the right action against the SULFAs involved in this case. Similar situation was found in case of Nalbari police sheltering SULFAs. Indeed the police- SULFA nexus has been submitted in arguments by the learned counsel for the Commission, the Government, and the parties. This means that some SULFAs emerged as an extra-constitutional authority. In case some of the SULFAs were such a body of persons and were used by police either as an auxiliary, or as the striking arm, they would also be part of the conspiracy. . We have already discussed that as conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In the killing of Nripen Dowarah there were some persons in the acts of forcibly taking away and killing. But there was a course of conduct involving the deciders of the course of action culminating in the killing. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of killing show that there must also have been some authoritative institutional assurance of safety to the killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being among the protectors against the victims they were bound to protect under the law, in this case.

II. Motive behind the killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence of P.W 1 that Nripen was a simple cultivator having no enemies, and it was not known why he should have been kidnapped and killed as found in evidence. This statement was not challenged in cross-examination. There is also an attempt on the part of Gaurisagar police to garb Nripen Dowarah as an ULFA, as if to justify his killing. Therefore, there could be no doubt that Gaurisagar police having been a part of the conspiracy. The then Chief Minister published press appeals to the members of ULFA families to persuade their ULFA members to give up path of violence and surrender. The fact that there was a request made to the literary organizations and Sahitya Sabhas of the State to persuade the ULFAs to surrender is in the deposition of the then Chief Minister Mahanta in other cases.. A course of conduct by different agencies towards similar persuatuin and the forewarning that in case of failure to effect surrender consequences would not be good for the family of Nripen Dowarah thereafter finally culminating in Nripen Dowarah's killing support such a conclusion beyond reasonable doubt.. Contemporary similar killings brought in evidence of this case also showed that it was the consistent pattern to follow. One may question why, in face of the constitutional and legal right for every citizen to freedom of thought and belief, freedom of association, the relatives need be pressurized to bring their wards back to

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peace talks, and why relatives who failed to do so should be mentally tortured and reign of terror let loose and when even then they failed, they should be secretly killed? The way in which, and with which Nripen Dowarah and Deep Borah have been killed leaves no doubt that the killers enjoyed complete immunity for their acts of killing. The way in which in this case, as in all other Sibsagar cases, the investigations were made to fizzle out and the F.R.s (Final Reports) were submitted shows that the police has been in collaboration with the killers. All these also prove that the entire scheme is being remote-orchestrated from the top of the department.. Those in helm of the Department must be held accountable and need be brought to justice. The matter being of criminal nature proof must be beyond reasonable doubt. The evidence in series of cases with common characteristics leads to such a conclusion beyond reasonable doubt. The persons who participated in the act of actual killing on the fateful night, must have been the same or their agents and accomplices and as such, there could be no other answer than that there was criminal conspiracy in the killing of Shri Nripen Dowarah and Shri Deep Borah in this case.

(II) Motive The immediate motive of the killers could be any reward or satisfaction emanating from those who harboured the ultimate motive and engaged the killers. The desire of a consequence is the motive for an action. Garbing him as ULFA, Shri Nripen Dowarah and Deep Borah have been executed brutally, for no fault of theirs, and only for their being garbed as ULFA., that was, for a status offence without any sanction of law and in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. The motive was the perpetuation of the AGP rule in the State of Assam by villainy, treachery and monstrous cruelty and the dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material.. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as - a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the killing will mean that for which the killer has committed the killing, and without which he would not have done it. We have to ascertain from the circumstances, anterior, present and posterior to the incident of killing, The anterior circumstances were that Nripen Dowarah and Deep Borah were suspected to have been members of the banned outfit ULFA

This reminds one of the Vaishnavite concept of "Kshatriyaka katila Parasu kare dhari, nikhatriya karila samaste basundhari" (You have cut the Kshatriyas holding the parasu axe and made the entire earth Kshatriyaless."

Questioned on the two cases, namely, that of killing of Dimba Rajkonwar and that of Dr. Dharanidhar Das and family, Shri G.M. Sroavastava said (A, 88) "Normally police compares the cases on the basis of *modus operandi* and circumstances". Those have been considered in this case. From the evidence there is no doubt that there was conspiracy in this case.

(D) Pinpointing responsibility on persons involved directly or indirectly in commission of killing.

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is forthcoming in such extents as could help us in pinpointing responsibility on the persons

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involved. Fortunately the term of reference mentions "involved directly or indirectly in commission of killing" This enables us to act on basis of integrated evidence rather than on isolated ones. We have therefore to integrate such parts of evidence as will lead to a conclusion beyond reasonable doubt, for pinpointing responsibility. Besides what are found in relevant pieces of evidence, the common characteristics found in each individual case also throw some light. We have, of course, to follow the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasonable doubt in this case.

The Best Evidence Rule." Phipson on Evidence," 9th ed. P. 51 under caption : "The Best Evidence Rule. Strict Proof" Says: "The maxim that "the best evidence must be given of which the nature of the case permits." has often been regarded as expressing the greatest Roman Normalat fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P. 53) According to Phipson, "In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court".

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of seven cases is therefore is relevant and admissible,

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e, when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz, as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so.. The foundation of this is the probability or likelihood of that

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agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation, accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C. Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence. Few other officers also indicated such interference.

The following common characteristics of the first group of seven cases and the Second Group of eight cases are found in this case while answering its terms of reference so as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely :

1. That this killings involved garbed ULFA families, being those of the garbed Ulfas Shri Nripen Dowarah and Shri Deep Borah. As these killings are not claimed by police, the question of the victims being Ulfas or not is immaterial, as others cannot kill Ulfas as in this case. . . .

2. Unlike in other cases, this killings of Shri Nripen Dowarah and Deep Das were committed after they were forcibly kidnapped in the broad day light from Majorgaon Shapori Chuk, killed them somewhere, and carried onr of the dead bodies to Lakwa Station Chariali, and the other to Chalapathar Reserve eoad and dumped there one by one...

3.. The assailants covered their faces with black wrappers and, to avoid being identified.

4. The weapons used in killing were sharp cutting weapons like swords, daos, gandasas, firearms of prohibited bore being .32/.38 bores, and heavy heavy materials generally found in police-military situations.

5. The firearms being of prohibited bores, forensic examination of the material exhibits empty cartridges of A.K. 47 rifles was avoided. Investigation fizzled out, case returned in F.R..

6. The vehicles used were reportedly Maruti Gypsy and two Tatamobiles, which were never seized or taken into custody, .

7. There were no fixed police patrolling in the crime areas prior, posterior or during the killings.

8. That the army was ubiquitous. There was lurking evidence of Police-SULFA nexus in the killing,s some of the latter being constituted into an extra-Constitutional authority and used as the executioners.the *modus operandi* being to kidnap the victimsby masked persons take them to pre-arranged places and secretly cut, pound or shoot them dead, and then carry the dead bodies to different places by same Maruti or other vehicle and dump theos there... In this case kidnapping was in the evening., killing at night and and dumping next early morning...

9. There was general resentment and decry against the Unified Command Structure, the Chief/ Home Minister and the local M.L.A..

10. There was connivance of SULFA; and omission to examine and make any SULFA an accused, despite clues pointing at them...

11. The investigation did not commensurate with the seriousness of the crime perpetrated; and the clueless case was returned in F.R.

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12. That modern scientific methods of investigation, finger/foot prints, dog-squads were never used.

13. No condolence message was sent from the then Govt. of Assam to the victim families.

14. No ex-gratia/compensatory payment was made or offered by the then Govt. of Assam in this case.

15 In this case death penalty has been imposed for "status offences," on Shri Nripen Dowarah and Shri Deep Borah garbing them as Ulfas, without producing sufficient proof thereof.

16 That in all the cases, including this case there is remote orchestrated Ulfocide, death penalty having been imposed on the victims for "status offences," garbing them as Ulfas, without producing adequate proof thereof. This conclusion is based on facts and the similarities of all the cases in almost all respects, which could not be so, unless there was remote orchestration from higher authorities. The remote was then supposed to have been at Home Minister..

On the basis of evidence, the responsibility of persons involved directly or indirectly in killings of Shri Nripen Dowarah and Shri Deep Borah may reasonably be pinpointed on the police protected Sulfas of Sibsagar Town, under leadership of Shri Kushal Duori @ Jayanta Hazarika, as named by the witnesses, in this case; and the then Sivasagar District Police administration. It is recorded that Shri Kushal Duori denied his involvement and said that the people do not remember other Sulfa names and so they mention his name.

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(1) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure, which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/requisition by the State Govt. The Structure itself envisages its review after every three months, and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para 14 of

"Part I. INTRODUCTORY." of this report and is referred to in this context.

The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State.. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire, first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed

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forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

The Army Districts. In para 15 we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; amunitions or explosive

substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction, execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions would amount to violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitions and/or some Ulfa related papers are posthumously put near the dead bodies, obviously for post mortem justification of the killings. This will not stand on the way of the spade being called a spade...

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" **Sukracharya's Dandaniti is based on danda**, meaning, punishment. Ancient sages said that without *danda matsyanyaya will prevail and* the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them

on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner..While no training course will be appropriate, considering their exalted position and prestige, periodical

periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea..their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters", trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law.

So far as the Government wings, agencies, and authorities, both official and political, the principle of "responsible superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional, legal and human rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle.

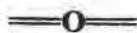
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But even here, except in the criminal cases, the insolvency principle should be followed and the political persons also be given fair field and no favours in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

This case deserves to be revived and re-investigated.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the bread earning patriarch of the family has been shot dead under the circumstances discussed in the case. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, including the minor children of the bereaved family. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to each of Shri Giridhar Dowarah, , and Shri Jogeswar Borah, fathers of the victims, for the benefit of each family, a sum of Rs 5,00,000/- (Rupees five lakhs only...forthwith. More than six years have already elapsed and it brooks no farther delay.



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**SARBASHRI BIJIT DUTTA, HEMANTA GOGOI,
JOGESWAR GOGOI & UMESH DAS KILLING CASE**

Haluating P.S. Case No. 51/98

Date of Occurrence 23.9.98

By this Commission's order dated 14.11.2006, by virtue of the authority conferred on it by the Government of Assam's Notification Nos. No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No. No.PLA 331/2005/1 dated 22.8.2005, after hearing the applicant and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case, the following terms of reference, and any other related and relevant matters with recommendations, if any, namely:

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“(A) Circumstances , in each case, leading to the killing of its victim(s).

(b) Identity of the killer(s) and accomplice(s), if any.

(c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s)

(d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killings

(e)To make recommendations to prevent recurrence of such killing(s)

(f) Any other matter related to or relevant to the purpose of this inquiry;”

(A) Circumstances leading to the killing of Sarbashri Bijit Dutta, Hemanta Gogoi, Jogeswar Gogoi & Umesh Das.

On 23.8.98 at about 5 a.m. at the Tiphuk Tea Estate, a cowboy Shri Gandhiram Koiri saw four dead bodies of unknown persons lying serially in a small drain of the garden and reported the fact to Shri Ramaswamy Pandab, choudikar of the same garden office, who informed the Chodhury Saheb of the garden, who in turn informed Maina Orang V.D.P Secretary of the garden. Moina Orang immediately went and saw the dead bodies and thereafter lodged an FIR stating what he had seen. The inquest report showed that one dead body, aged about 25 years had a bullet injury, the second, aged about 28 years, bullet injuries and both his hands tied with a gangi, the third, aged about 20 years with cut and bullet injuries. and the fourth, aged about 30 years with bullet and stab injuries.

The post mortem reports showed 1. On Bijit Dutta's body one penetrating missile wound on right shoulder. The entry wound is in the back and the exit wound on the front, shape of entry wound is circular with burning of surrounding tissues. Size 2 cm in diameter. It has fractured along the track its scapular bone and tissues. 2 Clean cut wound on the left thigh. 10 c.m.s above the knee joints. anterior aspect in oblique direction. The wound is retracted with clotted blood around the wound. 3. Clean cut wound at right calf in retracted position. size 7 c.m. in length and 2 c.m. in breadth and 4 c.m. in depth. All the cut wounds were produced by sharp cutting weapons. Penetrating wounds were fired from firearms from close range. All wounds were ante mortem and homicidially inflicted.

On the body of Hemanta Gogoi 1. Clean cut wound on the right cheek 8 cm length 2.5 c.m. breadth and depth. 2, Clean cut wound at right shoulder cutting the deltoid muscles. 8 c.m in length and breadth and 3 c.m. in depth. 3. Missile wound at left shoulder with laceration of deltoid muscle and fracturing the head of the left feumerous bone. The entry wound is circular in shape situated at the back of the left shoulder and the exit wound is at the anterior and upper part of the shoulder. 4. The left elbow joint is completely lacerated by two missile wounds. 5. Clean cut wound at right sole of foot.

On the body of Shri Umesh Das. 1. Right shoulder joint lacerated with laceration of soft tissues. 2. Entry wound a slit like wound is found just above and posterior to the left ear. Margins are inverted. 3. Exit Circular wound with everted margin found just above the right ear. The person died of the missile wound at the head fired from a firearm at close range.

On the body of Jogeswar Gogoi, 1, Clean cut wound at the occipital region 7 c.m. in length, 1 c.m in depth, and 2 c.m. in breadth. 2. Tissue swelling at forehead with sign of inflammation 5 c.m. in length and 3 c.m. in breadth. 3. Tissue swelling on right cheek with sign of inflammation size length 7 c.m. breadth 4 c.m. 4. Missile wound with lacerated burning of tissues on left cheek. Size

8 c.m. in length and 2 c.m. in breadth. 5. Circular wound with burning of tissues at third i.c.s. of right side of front chest. 8 c.m. in diameter. This is the entry wound of the missile. 6. Circular wound with everted margin at the back of chest just right lateral to the mid vertical line in 4th i.c.s. Size 2 c.m. in diameter. The clean cut wound was caused by a sharp cutting weapon with sufficient force. The wounds on forehead and right cheek were caused by a blunt weapon. The person died of the missile wound on right side of the chest caused by a missile fired from a firearm from close range.

(B) The identity of the killers, and their accomplices, if any

The killing of Sarbashri Bijit Dutta, Hemanta Gogoi, Jugeswar Gogoi and Umesh Das is secret both as to place of killing and as to the identity of the killers and their accomplices if any; The identity of the killers and their accomplices have to be determined on basis of the evidence on record. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea* or *negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. We discussed the meaning of "secret". In para 7 of the Introductory Part 1. Identification of the killers has to proceed on the basis of investigation and evidence wherefrom, as submitted by Dr. Y.K. Phukan and Mr. P.K. Musahari, two shortcomings appear from records, namely, that only routine investigation proceeded; modern methods were not used; police dogs were not engaged, to sniff out the culprits; foot or finger prints were not taken. Investigation was perfunctory, as important evidence were not taken promptly or not at all.

P.W.1 Shri Raju Dutta of Jhanji Jamuguri Murakata village in his affidavit dated 22.9.06 said that some policemen from Gaurisagar P.S. coming to their house informed them that their brother Shri Bijit Dutta's dead body was lying at the Sibsagar Civil hospital after post mortem examination and requested them to take charge of it. Next day they took the dead body from the hospital in an almost decomposed condition and cremated it with permission of the Deputy Commissioner. How and under what circumstances his brother died was not known to him. He could learn that with his brother three other boys also died under mysterious circumstances. Someone told that a case was registered, but after inquiry at Sibsagar, nothing was known. He further deposed that the relatives were interested in seeing the post mortem report which was not seen by them, and he was directed to go to Haluating P.S. where he was told that Bijit Dutta was killed by secret killers rampant in those days; and he stated that his brother Bijit was not connected with the Ulfa organisation and that no compensation was given to them. Giving up studies in school Bijit helped in family agriculture. He left for his related cousin Shri Bogai Dutta's house at Dikhounukh Kharadhara Ghat, 4/5 days prior to recovery of his dead body, but Bagai Dutta said that Bijit did not reach his house. Bijit's alias, "Bedanta Shyam Saikia" was known to the witness from the Haluating police for the first time. How the Gaurisagar police could know Bijit to have been of their family was not clear. The killers might have said so.

K. K. P.W.2 Shri Ratneswar Dutta, paternal uncle of Bijit Dutta, deposed that first they received the information from Gaurisagar P.S. that 4 youths were killed at Dikhounukh Kharadhara Ghat and their dead bodies were dumped serially at a drain of the Tiphuk tea estate and they were asked to go and identify. Till then witness did not know that Bijit Dutta was one of those four

youths. The Sibsagar and Gaurisagar police, including some policewomen and about 7000 villagers attended the cremation till the end. Thereafter the relatives went to Kharadhara ghat and learnt that when the four boys were about to board the crossing ferry, suddenly a vehicle came there and some people alighted from it and surrounded the four boys and forcibly dragged them into the vehicle and took them away. Who were the persons coming in the vehicle none could say, but when one of the boys was being forced into the vehicle, cried "Kaliada, Kaliada, I am being killed" From the voice people could know that the boy was Bijit Dutta as Kalia was the son of his uncle Bagai Dutta. Witness did not know how Gaurisagar police knew the dead body to have been of Bijit Dutta and inform them. . . .

P.W. 3 Shri Bubul Dutta said that even after the information was received, they could not pursue the matter in the then prevailing situation for feeling of insecurity of their own lives, as the fear psychosis created by secret killers was at its peak. Asked what he meant by secret killers (gupta ghatak) and who created them, the witness said: "The people who were roaming in Maruti Gypsy vehicles covering their faces with black cloth and caused secret killings with drsdly weapons were called 'Gupta ghataks' among the people and the Govt. was its creator. Our local M.L.A. Pradip Hazarika who was then Transport Minister was also responsible with the then head of the Govt. P.K.Mahanta" Witness said that Sulfas were the secret killers as reported in news papers and they killed people like Bijit Dutta, and they dared not go to police to be beaten up..

P.W.4 Shri Pabitra Gogoi, elder brother of Hemanta Gogoi, of Jhanji Jamuguri Balamia Gaon, deposed that at the time of his death his younger brother Hemanta was aged 21/22 years. Pabitra bore all the educational expenses of Hemanta who was then reading in Higher Secondary Second year and appeared at the examination. It was tragic that after his death he was declared to have passed Higher Secondary examination. At about 4 p.m. on 23.9.98 about 6/7 policemen from Gaurisagar P.S. came to their house and informed that one Hemanta Gogoi's dead body was lying as the Sibsagar Civil Hospital, and when he arrived at that hospital, and it was already dark, he was given a candle to identify the dead body, but he could not do so in insufficient light and therefore had to go again the next day. with his maternal uncle and few other neighbours to identify the dead body, and he could identify the body as one of his toes was bent due to accident in football play, as his mother told him. It being already dark he had to go there next morning to take the dead body home, for which the S.P Sibsagar gave him Rs.200. The dead body was escorted by S.P and Assam police and C.R.P.F in 4/5 police vehicles which remained till the end. Witness said that his younger brother Hemanta was not a member of the ULFA and the secret killers had illegally killed him. He said that he did not know that Hemanta had an alias and for the first time the Haluating police told him that he had one. He was studying in Jhanji Hem Nath Sarma College, and that on the previous day, i.e., on 22.9.98 Hemanta took Pabitra's permission to go to their maternal uncle's house at Charing. By "secret killer" he meant a group of police black panthers in collaboration with Sulfas acting in obedience to the State Government and killing Ulfas and other innocent persons garbing them as Ulfas,. He thought that his brother was also killed by the above people and that is why police took no action when complaints were lodged. He clarified that the Secret killers were created at the instance of Shri P.K.Mahanta and his Govt.

P.W. 5 Shri Binod Saikia corroborated Pabitra Gogoi saying that Hemanta was not in ULFA, as could be seen from his joining the village Hussori party throughout the previous bihu session till the middle of May being constantly with the party and in previous July he attended a marriage ceremony of Binod's cousin. He was seen all along in the village club. He was a regular college student and having prescribed percentage of attendance, he was allowed by the College

and he passed his Higher Secondary examination All these belied the hypothesis that he was an Ulfa..

N.W. Shri Phuleswar Gogoi was the O.C. of Haluating P.S. on 23.9.99 when at about 6.25 p.m. he received an information from V.D.P Secretary Shri Moina Orang and another from the Asst Manager of Tiphuk T.E. Md. A.M. Choudhury that in Section 4 of the Tiphuk T.E. 4 dead bodies were lying. The O.C., registering the case at 6.25 a.m. immediately proceeded to the place of occurrence, found the dead bodies and asked the people present there if any one could identify the dead bodies, but none could. He started and completed the inquest over the dead bodies one after another and found what is stated under term (A) above. To him all the dead bodies appeared to be of Assamese people According to O.C. The dead bodies were later identified by respective relatives as of:.. the first, as Shei Hemanta Gogoi @ Bijit Saikia; the second, as Shri Jogeswar Gogoi @ Jiban Mohan; the third, as Shri Umesh Das @ Umesh Hazarika; the fourth, as Bijit Dutta @ Bedanta Shyam Saikia. (The relatives deposed that they heard the @ names for the first time from Haluating police) The O.C. examined some of the persons on the spot and was told that when Gandhiram Koiri, while coming to tend his cattle, saw the dead bodies and narrated it to the Garden Choukidar Shei Ram Swami Pandav who reported to the Asst. Manager Mr. Choudhury, and Shri Moina Orang lodged the Ejahar on that basis. Ram swami Pandav stated to I.O. that on the previous night he was working as night Choukidar of Tiphuk T.E. from 9 p.m. and at about 9.30 p.m. he saw one Maruti Gypsy, upper portion blue, and body portion white, stopped near the Gate No.1, and almost at the same time 2 tea leaves carrying tractors also arrived at the gate from Tiphuk Division of Amguri T.E. after delivering tea leaves. At that moment the Tiphuk Division Choukidar was not there as usually they lock the gate and go home at night depositing the gate key in Tiphuk Division office. Ram Swami Pandav brought the key from office and first allowed the two waiting Tea leaves tractors to enter and then with his force examined the waiting Gypsy and saw the driver in civil dress and 4 persons sitting in the Gypsy wearing "Kabra dress" three of them holding short arms. Opening the gate he first allowed the tractors to enter Amguri side and then the Gypsy crossed the division towards Amguri. The Gypsy came from Borchila Tea garden through which one could come from Namti-Geleki Side. About half an hour later one Tiphuk Division factory worker told him that he heard some firing sounds perhaps for driving away elephants from Amguri Division; but little later someone said it was real firing. O.C. examined seven relatives of the deceased persons but none of them was examined in Court. During his period none could give any clue in the case and none was accused. O.C. admitted that on 23.9.99. itself Shri Niren Neog, S.I Haluating P.S. applied to the C.J.M., Sibsagar for police custody of detainees Raju @ Rau Barua, shri Bijoi Gogoi, and Shri Baba Saikia, all in judicial custody in Sibsagar Jail, and arrested under Sections 10/13 U.A.(p) Act for the purpose of identifying the four dead bodies of this case.. The witness could not say anything about it as the papers were not there in the records. The O.C. tried to obtain the antecedents of the four boys, but without giving details said that his impression was that the boys were Ulfas. No details were made available. He admitted that no arms were recovered from any of them. The O.C. denied the CRPF carrying any operation on the date of occurrence, as, he said, the CRPF did not possess any Maruti Gypsy. O.C. said that the empty cartridge cases recovered from the place of occurrence were of A.K.47 rifles and those were sent for examination by the Battalion Armourer. No details could be given of the "ULFA related documents supposed to have been recovered from the place of the dead bodies.

Kul N.W. Shri Pradeep Kumar Dutta joined was O.C. of Haluating P.S. on 6.2.2000 and took over the investigation of the case. on 10.2.2000 From the C.D. he learnt that no clue had been found till then. He himself visited the place of occurrence and examined number of persons there and yet no clue could be found. He did not examine the three persons for whose

police custody it was applied for, nor did he examine any of those three persons. From the records he also was of the impression that the deceased boys were Ulfas, but he did not try to ascertain whether actually they were so from the relevant police records. He never had the idea that the killing could have been handiwork of Sulfas, and no Sulfa was examined. He denied the suggestion that the killing was in a police/CRPF and Sulfa combined operations and therefore he did not investigate properly. He admitted that during investigation of the case there was not a single supervisory note from any higher authority. To a suggestion that during his period from 10.2.2000 to 3.4.2000 only six few and far between entries were made in the C.D, and that was enough to show that the investigation was a mere eye-wash, the witness replied, "I have no comment to make."

From the modus operandi of the case, namely forcibly lifting of the four boys from Dikhomukh Kharadhara Ghat and the four dead bodies being thrown serially at a narrow drain of the Tiphuk Tea Estate under Haluating P.S., and the various firearm shots and sharp weapons cut injuries, particularly the nature and positions of the deep cut injuries, these may be reasonably taken to have belonged to the same category of other cases in Sibsagar district. In this case the Choukidar saw the occupants of the Maruti Gypsy, the driver in civil dress and the other three in "Kabra dress" This may be indicative of C.R.P.F. However, the C.R.P.F. was expected to have their own vehicle and not one driven by a civilian. In some earlier cases even Sulfas were seen donning army or C.R.P.F. falses. All these are indicative of being the handiwork of an organised group of secret killers expert in killing by swords, daos or any other sharp cutting weaponz, though in some of them in addition to cutting injuries, shooting by sophisticated firearms were also there. It was also to be noted that forcible lifting of unsuspecting boys into Maruti Gypsy vehicles taking them to a place and cutting and shooting them dead, and then carrying the dead bodies by road in motor vehicles to a distance and drop those at places would not be possible unless the police were conniving or even being in league with the police protected secret killers. The identity of the killers have, therefore, to be reasonably confined to the protected Police-Sulfa nexus of Sibsagar Town and their accomplices/facilitators almost giving an idea of State sponsornrg. these secret killings of Sarbashri Bijit Dutta, Hemen Gogoi, Jogeswar Gogoi and Umesh Das garbing them as ULFAs without producing sufficient proof thereof. It is also to be noted that the relative witnesses stated that the alias names of the deceased boys were heard by them for the first time from the Haluating P.S. and these statements were not challenged at all. How the Gaurisagar P.S. could first know the names of the boys, and what was the relation between the three detainees for whose custody the Gaurisagar P.S. by Nuren Neog's application was never satisfactorily explained by the Noticee witnesses. At some stage it appeared that those three might have had something to do with the killing of the four boys. On the other hand the relatives narrated facts which belied the boys' being Ulfas. It is also interesting to observe that the then Police officers concerned did more for garbing the boys as Ulfas than trying to find clue in the case, and nothing can be more surprising than seeing the police having never suspected the protected Sulfas in Sibsagar camp, and not examining even a single Sulfa, far less making them accused, and allowing the investigation to wither away. All these lead to the conclusion of the State policy of ulfocide, i.e., deliberate killing of Ulfas, members of Ulfa families and their relatives through State orchestrated swcret killings. The names of those protected Sulfas were circulated from mouth to mouth, but the State criminal administration buried its head under the sand. This reminds one of the Vaishnavite concept of "Kshatriyaka katila Parasu kare dhari, nikhatriya karila samaste basundhari" (You have cut the Kshatriyas holding the parasu axe and made the entire earth Kshatriyaless)."

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From the above evidence, particularly the nature of kidnapping, injuries on the dead bodies and the carrying to and throwing the dead bodies at two different places by the two Tatamobiles, as seen by the witnesses examined, the identity of the killers may reasonably be confined to the Sibsagar district police administration and the organised and police protected Sulfa group of Sibsagar. The recorded supposed statements of the fathers of the two victim boys may be indicative of the efforts of the police administration to garb the boys as Ulfas. Unless the killings were claimed to have been by the police, the boys' being Ulfas or not was immaterial, because others have no right to kill any boy even if one was an Ulfa.

(C) Whether there was any conspiracy in targeting the victims and the motive behind such killings.

This term is replied in two parts, 1. Conspiracy in targeting, and 2. Motive behind killing.

.Conspiracy in Targeting the Victim. Conspiracy in the context of the instant inquiry, will mean criminal conspiracy which is defined in Section 126A of IPC as follows:-

"When two or more persons agree to do or cause to be done-

(1) An illegal Act, or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing. As defined in Section 107 of the Indian Penal Code (IPC)

"A person abets the doing of a thing, who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explanation -1. A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

Explanation -2 Whoever either prior to or at the the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act".

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the killing of Subarna Rabha has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators? It is in evidence that the family members of Subarna Rabha were requested by various Govt. agencies to persuade their younger brother shri Nirbhoi Rabha, who has been an ULFA, and were forewarned by the army, the CRPF and police that if Nirbhoi Rabha could not be persuaded, by them to join the peace talks and bring peace, the consequences would not be good for the family. The persons who

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participated in the act of actual killing on the fateful night, must have been the same or their agents and accomplices and as such, there could be no other answer than that there was criminal conspiracy in the killing of Sarbashri Bijit Dutta, Hemanta Gogoi, Jogeswar Gogoi and Umesh Das

There is evidence to show that the Sulfas were enjoying protection from the police. This may have disabled the police from taking the right action against the Sulfas in this case. Similar situation was found in case of Nalbari police sheltering Sulfas. Indeed the police-SULFA nexus has been submitted in arguments by the learned counsel for the Commission, the Government, and the parties. This means that the Sulfas emerged as an extra-constitutional authority. In case the SULFA were such a body of persons and were used by police either as an auxiliary, or as the striking arm, they would also be part of the conspiracy. We have already discussed that as conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In the killing of Subarna Rabha there were 5/6 persons in the act of killing. But there was a course of conduct involving the deciders of the course of action culminating in the killing. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of killing show that there must also have been some authoritative institutional assurance of safety to the killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being between the killers and the protectors against the victims they were bound to protect under the law, in this case.

II. Motive behind the killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence of P.Ws that, there were no other reason for killing the victim except for that they were garbed as Ulfas. This statement was not challenged in cross-examination. Therefore, there could be no doubt about the garbers having been a part of the conspiracy to feed fat the grudge between the concerned Sulfas and the garbed Ulfas. The then Chief Minister published press appeals to the members of ULFA families to persuade their ULFA members to give up path of violence and surrender, the Army, the CRPF and the police accordingly advised the families, and also forewarned that consequences of failure to do so would not be good for the family and persuaded the members of Subarna's family in that line. The fact that there was a request made to the literary organizations and Sahitya Sabhas of the State to persuade the ULFAs to surrender is in the deposition of the then Chief Minister Mahanta. in another case. A course of conduct by different agencies towards similar persuasion and the use of the concerned Sulfas, and consequent ambitions raised in the minds of the protected concerned Sulfas finally culminating in the killings, support such a conclusion beyond reasonable doubt. Contemporary similar killings brought in evidence of this case also showed that it was the consistent pattern to follow. One may question why, in face of the constitutional and legal right for every citizen to freedom of thought and belief, freedom of association, the victims should have been garbed as Ulfas without having reliable proof, they should have been secretly killed? The way in which, and with which Sarbashri Bijut Dutta, Hemanta Gogoi, Jogeswar Gogoi and Umesh Das have been killed leaves no doubt that the killers enjoyed complete immunity for their acts of killing. The way in which in this case, as in all other Sibsagar cases, the investigations were made to fizzle out and the F.R. (Final Report) was submitted shows that the police has been in collaboration with the killers. All these also prove that the entire scheme was being remote-orchestrated from the top of the department. Those in helm of the Departments must be held accountable and need be brought to justice. The matter being of criminal nature proof must be beyond reasonable doubt. The evidence

in series of cases with common characteristics leads to such a conclusion beyond reasonable doubt. .

The immediate motive of the killers could be any reward or satisfaction emanating from those who harboured the ultimate motive and engaged the killers. The desire of a consequence is the motive for an action. The budding youths have been executed brutally, for no fault of theirs, and only for their being garbed as Ulfas, that was, for a status offence without any sanction of law and in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. The ultimate motive was the perpetuation of the AGP rule in the State of Assam by villainy, treachery and monstrous cruelty and dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as - a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the killing will mean that for which the killers have committed the killings, and without which they would not have done it. We have to ascertain from the circumstances, anterior, present and posterior to the incident of killing. The anterior circumstances were that Sarbashri Bijit Dutta, Hemanta Gogoi, Jogeswar Gogoi and Umesh Das were garbed as members of the banned outfit ULFA. Getting them killed by secret killers shall be illegal, and violative of fundamental and human rights of the victims. More so when secret killings are resorted to through State protected secret killers, as in this case, there surely was conspiracy in this case. It is accordingly held that there was conspiracy in this killing.....

(D) Pinpointing responsibility on persons involved directly or indirectly in commission of killing.

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is forthcoming in such extents as could help us in pinpointing responsibility on the persons involved.

Fortunately the term of reference mentions "involved directly or indirectly in commission of killing". This enables us to act on basis of integrated evidence rather than on isolated ones. We have, therefore, to integrate such parts of evidence as will lead to a conclusion beyond reasonable doubt, for pinpointing responsibility. Besides what are found in relevant pieces of evidence, the common characteristics found in each individual case also throw some light. We have, of course, to follow the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasonable doubt in this case.

The Best Evidence Rule. "Phipson on Evidence," 9th ed. P. 51, under caption: "The Best Evidence Rule. Strict Proof" Says: "The maxim that 'the best evidence must be given of which the nature of the case permits.' has often been regarded as expressing the greimes Roman Normalat fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P. 53) According to Phipson, 'In the, present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct,

and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court".

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of cases is, therefore, relevant and admissible,

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said:

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e, when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz, as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so.. The foundation of this is the probability or likelihood of that agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation, accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C. Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence. Few other officers also indicated such interference.

The following common characteristics of the first group of seven cases and the second group of eight cases are found in this case while answering its terms of reference so as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely :

1. That this killings involved garbed ULFA families, being those of the garbed ULFas Sarbashri Bijit Dutta, Hemants Gogoi, Jogeswar Gogoi, and Umesh Das Being or not being ULFA will be material only where the killing is claimed by police.. Others have no right to kill an ULFA. as such.

2. Unlike in other cases, this killing, of Sarbashri Bijit Dutta, Hemants Gogoi, Jogeswar Gogoi, and Umesh Das were committed after they were forcibly kidnapped in the

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broad day light from Dikhoumukh Kharadhara Ghat, killed them somewhere and carried the dead bodies to Tiphuk T.E. and dumped serially in a narrow drain there,.

- 3.. The assailants covered their faces with black wrappers and, to avoid being identified.
4. The weapon used in killing were sharp cutting weapons like swords, daos, gandasas, firearms of prohibited bore being .32/.38 bores generally found in police-military situations.
5. The firearms being of prohibited bores, forensic examination of the material exhibits empty cartridges of A.K. 47 rifles was avoided. Investigation fizzled out, case returned in F.R..
6. The vehicle used was reportedly a Maruti Gypsy which was never seized or taken into custody, .
7. There were no fixed police patrolling in the crime areas prior, posterior or during the killing.
8. That the army was ubiquitous. There was lurking evidence of Police-SULFA nexus in the killing, some of the latter being constituted into an extra-constitutional authority and used as the executioners. the *modus operandi* being to kidnap the victims by masked persons take them to pre-arranged places and secretly cut or shoot them dead, and then carry the dead bodies to different places by same Maruti vehicle and dump theos there... In this case killing was in the evening and dumping at around 9 p.m..
9. There was general resentment and decry against the Unified Command Structure/ Chief Minister and the local M.L.A..
10. There was connivance of SULFA; and omission to make any SULFA an accused, despite clues..
11. The investigation did not commensurate with the seriousness of the crime perpetrated; and the clueless case was returned in F,R.
12. That modern scientific methods of investigation, finger/foot prints, dog-squads were never used.
13. No condolence message was sent from the thn Govt. of Assam to the victim families.
14. No ex-gratia/compensatory payment was made or offered by the then Govt. of Assam. in this case.
- 15 In this case death penalty hasd been imposed for "status offences," on Sarbashri Bijit Dutta, Hemanta Gogoi, Jogeswar Gogoi and Umesh Das, garbing them as Ulfas, without producing sufficient proof. thereof.

16 That in all the cases, including this case there is remote orchestrated Ulfocide, death penalty having been imposed on the victims for "status offences," garbing them as Ulfas. without producing adequate proof thereof. This conclusion is based on the facts and the similarities of all the cases in almost all repects, which could not be so, unless there was remote orchestration from higher authorities. The remote was then supposed to have been with the Home Minister.. The authority need be held liable and be dealt with according to law.

On the basis of evidence, the responsibility of persons involved directly or indirectly in killings of Sarbashri Bijit Dutta, Hemanta Gogoi, Jogeswar Gogoi and Umesh Das may reasonably be pinpointed on the then police protected Sulfas of Sivasagar Town, under leadership of Shri Kushal Duori @ Jayanta Hazarika, as named by the witnesses, in this case; and the then Sivasagar District Police administration including the O.C.s of Haluating and Gaurisagar Police Stations. It is recorded that Shri Kushal Duori denied his involvement in this case and said that his name was mentioned as the people did not know the names of other Sulfas.

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This case deserves re-investigation on revival..

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(2) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure. which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/requisition by the State Govt. The Structure itself envisages its review after every three months, and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para 14 of

"Part I. INTRODUCTORY." of this report and is referred to in this context.

(3) The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State.. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire. first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy.. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

. The Army Districts. In para 15 we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts

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and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; amunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction, execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions would amount to violation of Constitutional

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and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitions and/or some Ulfa related papers are posthumously put near the dead bodies, obviously for post mortem justification of the killings. This will not stand on the way of the spade being called a spade...

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" Sukracharya's **Dandaniti is based on danda**, meaning, punishment. Ancient sages said that without *danda matsyanyaya* will prevail and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner. While no training course will be appropriate, considering their exalted position and prestige, periodical

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periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea, their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters", trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law.

So far as the Government wings, agencies, and authorities, both official and political, the principle of "respondeat superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional, legal and human rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle.

But even here, except in the criminal cases, the insolvency principle should be followed and the political persons also be given fair field and no favour in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

This case deserves to be revived and re-investigated.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the promising youths of the families of Sarbashri Bijit Dutta, Hemanta Gogoi, Jogeswar Gogoi and

Umesh Das have been cut or shot dead under the circumstances discussed in the case. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, including the minor children of the bereaved family. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to each of the families of the victims, Sarbashree Bijit Dutta, Hemanta Gogoi, Jogeswar Gogoi and Umesh Das, for the benefit of each of the families, a sum of Rs5,00,000/- (Rupees five lakhs). only forthwith. More than six years have elapsed, and it brooks no farther delay.

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SHRI DIGANTA DAS KILLING CASE

Demow P.S. Case No. 121/98

Date of Occurrence. 7.11.1998.

By this Commission's order dated 5.4.2006, by virtue of the authority conferred on it by the Government of Assam's Notification Nos. No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No. No.PLA 331/2005/1 dated 22.8.2995, after hearing the applicant and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case. the following terms of reference, and any other related and relevant matters with recommendations, if any, namely:

- “(a) Circumstances , in each case, leading to the killing of its victim(s).
- (b) Identity of the killer(s) and accomplice(s), if any.
- (c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s).
- (d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killing(s)
- (e)To make recommendations to prevent recurrence of such killing(s)
- (f) Any other matter related to or relevant to the purpose of this inquiry;”

(A) Circumstances leading to the killing of Shri Diganta Das.

On 7.11.98 at 2 P.M. An Ejahar was lodged by Shri Ganesh Chandra Das, son of Late Tularam Das, aged about 42 yers, resident of Barhoiting Gaon of Konwarpur Mauza, P.S. Sibsagar, President of Demow Meen Mahal Samabai Samiti, Akhoi Phutia, to the effect that early morning at about 4 A.M. when Shri Diganta Das, son of Shri Maheswar Das was keeping watch over the Meen mahal, some miscreants caused his death with sharp cutting weapn. On receipt of the Ejahar Shri Sira Kumar Patir, S.I. and O.C. Demow P.S. made G.D. entry No.148 and registered the Demow P.S. Case No.121/98 and he himself took up the investigation of the case The O.C. performed the inquest which showed that he found a deep cut injury on the right side of the neck almost severing it and deep cut injury

on the stomach and intestines coming out. On the back there were scars of lathi blows. The dead body was sent for post-mortem in the Sibsagar Civil Hospital at Joysagar. The post-mortem report says: Shri Diganta Das was a male aged about 30 years Rigor mortis present. Two major cut injuries are found, one over the neck and causing separation of steno mastoid manually (left) cavatoid vessels, oesophagus and trachea, another at intestine with multiple penetrating wound over intestine.

(B) The identity of the killers, and their accomplices, if any.

The killing of Shri Diganta Das is secret not as to the place of killing but as to the identity of the killers and their accomplices if any. The identity of the killers and their accomplices have to be determined on basis of the evidence on record. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. We discussed the meaning of "secret". In para 7 of the Introductory Part 1. Identification of the killers has to proceed on the basis of investigation and evidence. Two shortcomings appear from records, namely, that only casual investigation proceeded, modern methods were not used; police dogs were not engaged to sniff out the culprits; and foot or finger prints were not taken. Investigation was perfunctory, as important evidence were not taken promptly or not at all.

P.W. 1 Smti Arati Das, wife of the deceased, in her Affidavit dated 7.8.2006 stated that she is a citizen of India belonging to the Scheduled Caste. Seventeen years earlier she was married to Shri Diganta Das of the Scheduled Caste and they had four children, namely, Smti Namita Das, Smti Bandita Das, Smti Parimita Das and Shri Srimanta Das (son) Diganta used to do daily fishing and selling fish to maintain his family. As the Beel was 6/7 k.m.s away from their house, two days earlier he was staying there overnight. From some days earlier some people, in search of Ulfas created atrocities and terror in that area' and Arati Das was anxious about it. A little earlier she learnt that those people had cut a person to pieces. Next moment she learnt that the same people had killed her husband. The same day Police took away the dead body; and the next day the cremation was done. The group that killed her husband, she said, came in civil dress in 8/9 Jeeps which they parked a little away and came on foot to kill her husband near the Beel, Surrendered Ulfas of different places of the District and their leader were in the group that killed her husband. In her deposition on 28.12.2006 Arati Das said that she was married about 17 years back with Shri Diganta Das, who was a member of Demow Meen Samabai Samity. As a member of Demow Meen Samabai Samiti, Diganta carried out fishery business there. She became the mother of four children, three daughters and one son, all minors. From the income of the said fishery her husband used to maintain the family and she has since been deprived of it. She deposed that as a measure of protection, the Fishery was to be guarded and the members used to guard by a group of 5 to 10 persons by turn, On the fateful night it was her husband's turn to remain guard there. On 7.11.98 she received the information of her husband being killed early in the morning at the fishery beel. The dead body was first taken to the Demow Meen Samabai Samity at Demow where they could see the dead body, and thereafter it was taken to the Sibsagar Civil Hospital for post mortem examination. When

she saw the dead body, she saw the neck almost severed being connected only by the skin. Arati Das deposed: ..

" I did not make any prayer for ex- gratia or compensatory payment and Government has not given us anything till date. I could not know who was the main secret killer, and in fact about 2 and ½ years after the incident when I was unable to maintain my family and feed my children I myself went to meet Kushal Duori near the place of Sibsagar Station Chariali. On being asked who I was, I told him that I was the widow of Diganta Das. Hearing this the man appeared to be dumb founded and looking downward he did not talk with me for some time. and then he got up and telephoned several times and a little thereafter a number of young people came to him and after discussing amongst themselves they kept me inside the room . Then some of them asked me what was my educational qualification. I disclosed that it was up to Class VI. They asked whether I could manage a certificate of read up to Class X. I replied in affirmative and they gave me some time for procuring a certificate. Accordingly I managed the certificate and handed over to them. When nothing came up, I went again. to meet Kushal Duori but Kushal drove me away. Since then I have never gone to him. "

Asked precisely on what basis she went to meet Jayanta, Srati Das replied that "as immediately after the incident the people who were present there and the people who gathered said that the main killers were Jayanta and people also suggested and she was in dire need, she decided to go to Jayabta @ Kushal Duori.

Shri Kushal Duari @ Jayanta Hazarika deposed that he did not know any lady named Arati Das, wife of Late Diganta Das of Akhoiphutia village of Sivasagar, and that said Arati Das never came to his place or met him in any occasion. However, he said that being an M.L.A. if someone named Arati Das came and met him, he was not sure and that many persons used to come to him for seeking help and as a social worker he helped the people as much as he could. He clearly denied that Arati Das came to him for an employment and that he asked her to procure a certificate of having read up to class X for facilitating her appoiutment, and argued that at that time he was not an M.L.A. to have done so. During his lifetime he never met any person named Diganta Das of Akhoiphutia and of the Dimou Fishery beel. He also said that sometimes some people use other's names for their own purpose and if anything like that happened here he did not know. He informed that he was elected by the electorate of his Thowra constituency as M.L.A. and thefact that the people have voted for him showed that the people liked him. In cross he said that when in the ULFA he worked in his Khamon village of Bakata, hiding after the ULFA was banned. He was in Sibsagar in the night of 27/28 November 1998. In ULFA he was in its Telecommunication wing, repairing instruments when needed. No rank was assigned to him. He did not receive any warning from ULFA after his surrender; and he helped Sulfas like Shri Chitta Dihingia, Shri Manoj Bora and Shri Pranab Barua as they were coming out to establish themselves. He had no habit of reading newspapers regularly and so he did not come across the news item of killing of Diganta Das at Dimou Meen Mahal, but subsrquently knew about it. He did not know whether it was the result of SULFA-ULFA conflict as he did not know the antecedents of Diganta Das. He knew the location of the Beel as he happened to repair the Desang embankment with his own resources in cooperation of the local people im 1997. His relation with Sulfa Mridul Phukan was good. He was involved in several Tada cases after his surrender. He did not know that he was regarded as a terror by Sibsagar public.

P.W. 2 Shri Maheswar Das, father of Diganta Das said that when the dead body of Diganta was brought to the Demow Meen Samabati Samity office, he was allowed to see only the face and so also when it was brought back to the same office from Sibsagar

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accompanied by police and a Magistrate. Police did not ask him anything, Even then he did not know why his son was killed. He learnt from Samiti people and general public that his son was killed by Sulfa.

However, he had a premonition that there was a meeting of Ulfas a little away from the Beel. Sulfas asked some questions to his son and they were displeased with the reply and that might be the reason why they killed him. Elsewhere it was said that the Beel area was somewhat secluded and the Ulfas held meetings there.

Shri Pranab Kumar Das was the I.O. of the case for about six mnths from 15.3.2000, but did not make even a single entry in the case diary, nor did he take any investigative step during the period, and also could not explain why, even though at one stage he said he was busy investigating other cases, but could not say which were those case.s.. He once said that the case was S.R, but when it was shown that his successor Shri Girin Sonowal recorded it as non-S.R. case, he corrected himself. He said he knew some Sulfas of Sibsagar including their leaders Jayanta Hazarika and Mridul Phukan, and the facts of the case. The First F.R.(Final Report) in the case was dated 9.9.2000 which was rejected by the S.D.J.M. Sibsagar, and the next one dated 6.11.2002 was accepted by S.D.J.M., Sibsagar.. He denied the suggestion that he knew that in collabiration with Sulfas the police itself was involved in the case and that it was the reason for his not doing anything in the case.

On the basis of the above evidence it would be reasonable to confine the identity of the killers to Shri Kushal Duari and his Sulfa associates of that time. Mr Duori himself did not tell Smti Arati Das that he was not the killer of her husband Shri Diganta Das. believing which she approached him under dire need of help to maintain her children. The fact that they tried to help her would also may lead to the same conclusion. The premonition of Shri Maheswsar Das may also support the same hypothesis. The party was stated to have come in 8/9 Jeeps. This was not demolished in cross examination. However despite all the clues, the police never examined any Sulfa in this case. The then Sivassagar District Police administration is also The standard of investigation has been as poor as in all other cases under enquiry. It is accordingly considered beyond reasonable doubt that the police was in nexus with the Sulfas. The fact that not a single Jeep was detected or located puts it beyond reasonable doubt that there was central orchestration from the then apex authority in Home Ministry. otherwise such evidence could not have gone unnoticed..

From the modus operandii of the case, namely, coming openly in 8/9 jeeps , and the nature and position of the deep neck cut injury, it belongs to the same category of other cases in Sibsagar district. This is indicative of an organised group of secret killers expert in killing by sword/ dao or any other sharp cutting weapon, though in some of them shooting by sophisticated firearms were also there. This reminds one of the Vaishnavite concept of "Kshatriyaka katila Parasu kare dhari, nikhatriya karila samaste basundhari" (You have cut the Kshatriyas holding the parasu axe and made the entire earth Kshatriyaless)."

From the above evidence, particularly the nature of kidnapping, injuries on the dead body, as seen by the witnesses examined, the identity of the killers may reasonably be confined to the then organised and police protected Sulfas group of Sivasagar Town led by Shri Kushal Duori @ Jayanta Hazarika. and the then Sivasagar District Police administration; as. stated by witnesses in the case. It is recorded that Shri Kushal Duori @ Jayants Hazarika denied his involvement in this case.

(C)Whether there was any conspiracy in targeting Shri Diganta Das and the motive behind such killing.

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This term is replied in two parts, namely, I. Conspiracy in targeting, and II. Motive

I. Conspiracy in Targeting the victim. Conspiracy in the context of the instant inquiry, will mean criminal conspiracy which is defined in Section 126A of IPC as follows:-

“When two or more persons agree to do or cause to be done-

(1) An illegal Act, or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing. As defined in Section 107 of the Indian Penal Code (IPC)

“A person abets the doing of a thing . who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explanation -1. A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

Explanation -2 Whoever either prior to or at the the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act”.

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the killing of Diganta Das has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators? It is in evidence that the family members of Diganta Das

The persons who participated in the act of actual killing on the fateful morning, must have been the same as identified in term (B) and their agents and accomplices must have been as indicated therein.

There is evidence elsewhere to show that the SULFAs were enjoying protection from the Police Administration in Sibsagar district. This may have disabled the police from taking the right action against the Sulfas in this case. Similar situation was found in case of Nalbari police sheltering Sulfas. Indeed the police- SULFA nexus has been submitted in arguments by the learned counsel for the Commission, the Government, and the parties. This means that the SULFA emerged as an extra-Constitutional authority. In case the Sulfas were such a body of persons and were used by police either as an auxiliary, or as the striking arm, they would also be part of the conspiracy. . We have already discussed that as conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In the killing of Diganta Das there were persons in the act of

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killing. Also there was a course of conduct involving the deciders of the course of action culminating in the killing. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of killing show that there must also have been some authoritative institutional assurance of safety to the killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being among the protectors against the victims they were bound to protect under the law, in this case.

II. Motive behind the killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence of P.W 1 Smti Arati Das that there could be no reason for killing of her husband Diganta Das who was daily fishing and selling fish to maintain his family. This statement was not challenged in cross-examination. P.W. 2 Shri Maheswar Das, father of Diganta, had a premonition that there was a meeting of the ULFA that side and someone asked Diganta something and they were not satisfied with the answer and for that the SULFA killed him. Answering why she went to meet Jayanta, Arati said that all the people after the incident said that Sulfas killed him and Jayanta was their leader. Therefore, there could be no doubt that those Sulfas had been a part of the conspiracy.

The way in which, and with which Diganta Das has been killed leaves no doubt that the killers enjoyed complete immunity for their acts of killing. The way in which in this case, as in some other cases, the investigations were made to fizzle out and the F.R. (Final Report) were submitted shows that the police has been in understanding with the killers. All these also prove that the entire scheme is being remote-orchestrated from the top of the department. Those in helm of the Department must be held accountable and need be brought to justice. The matter being of criminal nature proof must be beyond reasonable doubt. The evidence in series of cases with common characteristics lead to such a conclusion beyond reasonable doubt.

The immediate motive of the killers could be any reward or satisfaction emanating from those who harboured the ultimate motive and engaged the killers. The desire of a consequence is the motive for an action. The member of the poor Scheduled Caste family has been executed brutally, for no fault of his, for a status offence without any sanction of law and in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. The motive was the perpetuation of the AGP rule in the State of Assam by villainy, treachery and monstrous cruelty and dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as "a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the killing will mean that for which the killer has committed the killing, and without which he would not have done it. We have to ascertain it from the circumstances, anterior, present and posterior to the incident of killing, which is illegal, punishable and violative of fundamental and human rights. More so when secret killings are resorted to as in this case.

Kul. **(D) Pinpointing responsibility on persons involved directly or indirectly in commission of killing.**

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is

forthcoming in such measures as could help us in pinpointing responsibility on the persons involved.

Fortunately the term of reference mentions "involved directly or indirectly in commission of killing" This enables us to act on basis of integrated evidence rather than on isolated ones. We have therefore to integrate such parts of evidence as will lead to a conclusion beyond reasonable doubt, for pinpointing responsibility. Besides what are found in relevant pieces of evidence, the common characteristics found in each individual case also throw some light. We have, of course, to follow the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasonable doubt in this case.

The Best Evidence Rule" Phipson on Evidence," 9th ed. P. 51 under caption: "The Best Evidence Rule. Strict Proof" Says: "The maxim that 'the best evidence must be given of which the nature of the case permits.' has often been regarded as expressing the normal fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P. 53) According to Phipson, 'In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court'.

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of seven cases is therefore is relevant and admissible,

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said:

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e, when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz, as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable,

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or is not perceived to be so.. The foundation of this is the probability or likelihood of that agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation, accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C. Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence.

The following common characteristics of the first group of seven cases and the second group of eight cases are found in this case while answering its terms of reference so as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely :

1. That this killing involved a Scheduled Caste family suspected to have had something to do with the ULFA meeting held in that locality.

2. Unlike in other cases, this killing, of Diganta Das was committed in the early morning hours and the assailants came in 8/9 Jeeps with swords / sharp cutting weapons in hand in twilight dawn. .

3.. The assailants convoy of 8/9 Jeeps were in view of the people of the locality and all said that there were the Sulfas of whom Shri Jayanta Hazarika was the leader..

4. The weapon used in killing was not detected or seized ..

6. The vehicles used were reportedly Jeeps and were never seized or taken into custody, despite those having been in public view..

7. There was no mention of police patrolling in the crime areas prior and posterior to, and at the time of the incident..

8. That the army was ubiquitous. There was lurking evidence of Police-SULFA nexus in the killing, some of the latter being constituted into an extra-constitutional authority and used as the executioners.

9.. There was general resentment and decry against the Unified Command Structure/ Then Chief Minister..

10. There was connivance of SULFA; and omission to make any SULFA an accused despite clues..

11. The investigation did not commensurate with the seriousness of the crime perpetrated..

12. That modern scientific methods of investigation, finger/foot prints, dog-squads were never used.

13. No condolence message was sent from the then Govt. of Assam to the victim family.

14. No ex-gratia/compensatory payment was made or offered by the then Govt. of Assam in this case..

15 In this case death penalty has been imposed for "status offences," on Diganta Das suspecting him to have had something to do with the ULFA who allegedly held a meeting in that locality sometime earlier.

16 That in all the cases, including this case of Diganta Das there is remote orchestrated

Ulfocide, death penalty having been imposed on the victim for "status offences," of being members of ULFA or suspected to do something with ULFA.

From evidence of this case, as in all other cases, "remote orchestration" of Ulfocide" is deducible. These common characteristics, along with evidence, prove beyond reasonable doubt, remote orchestration of "Ulfocide" from the Home Minister through Police-SULFA nexus using some Sulfas as the striking arms or executioners.

On the basis of evidence, the responsibility of persons involved directly or indirectly in killing of Shri Diganta Das may reasonably be pinpointed on the then police protected Sulfas of Sivasagar Town, under leadership of Shri Kushal Duori @ Jayanta Hazarika, as named by the witnesses, in this case, and the then Sivasagar District Police administration. It is recorded that Shri Kushal Duori denied his involvement in this case and said that he did not know if Smti Arati Das came to him for help, as he used to help needy persons and other Sulfas who came to him for help both before and after he became M.L.A.

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(1) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure, which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/ requisition by the State Govt. The Structure itself envisages its review after every three months, and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para 14 of "Part I. INTRODUCTORY." of this report and is referred to in this context. The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire, first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can

be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy. Meanwhile, in the interest of peace and tranquillity, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

. The Army Districts. In para 15 of the Part I Introductory, we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; ammunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police

station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions would not countenance violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitins and/or some Ulfa related papers are put near the dead bodies. obviously for post mortem justification of the killings This will not stand on the way of the spade being called a spade...

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" **Sukracharya's Dandaniti is based on danda**, meaning, punishment. Ancient sages said that without *danda matsyanyaya* will prevail and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern

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them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner. While no training course will be appropriate, considering their exalted position and prestige, periodical seminars and discussions at Government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea, their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters", trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law. I.

So far as the Government wings, agencies, and authorities, both official and political, the principle of "respondeat superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional, legal and human rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle, should be followed and the political persons also be given fair field and no favour in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

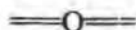
This case deserves to be revived and re-investigated.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare

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State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the bread earning patriarch of the family has been shot dead under the circumstances discussed in the case. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, including the minor children of the bereaved families. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to the widow of the victim, Smti Arati Das, for the benefit of the family, a sum of Rs.5,00,000/- (Rupees Five lakhs) forthwith. More than six years have already elapsed and it brooks no more delay.



(19)

SHRI PARAMESWAR DAS KILLING CASE

Hajo P.S. Case No107/99- Palasbari Case 93/99.....

Date of Occurrence 23.6.99

By this Commission's order dated 23.5.2006, by virtue of the authority conferred on it by the Government of Assam's Notification No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No. No.PLA 331/2005/1 dated 22.8.2005, after hearing the applicant and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry, with notice to the State Government.

By virtue of the aforesaid Notifications the Commission is to inquire into, in each case, the following terms of reference, and any other matters with recommendations, if any, namely:

- “(a) Circumstances, in each case, leading to the killing of its victim(s).
- (b) Identity of the killer(s) and accomplice(s), if any.
- (c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s).
- (d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killing(s)

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- (e)To make recommendations to prevent recurrence of such killing(s)
 (f) Any other matter related to or relevant to the purpose of this inquiry;"

(A) Circumstances leading to the Killing of Parameswar Das.

Mrs. Malaṭi Das w/o Late Parameswar Das, resident of village Kulhati under P.S. Hajo, district Kamrup, Assam, lodged an F.I.R. on 23.6.99 at Hajo Police Station at about 7 a.m. to the effect that on 22.6.99 at midnight when they were peacefully sleeping at their home, some miscreants came to their house and knocked at their door, and called "*Dasda Dasda*, we are coming from Hillside, please open the door and help us". It was heavily raining at that time. Though in fear, her husband opened the door when they saw 10/12 persons masking their faces with black cloths, at gunpoint, forcibly took away her husband Shri Parameswar Das.. Subsequently, on 24.6.99 Sri Parameswar Das' beheaded body was found floating near the south bank of Brahmaputra river near the Dakhala Hill embankment sluice gate, and one Shri Anil Kalita telephoned to the Palasbari Police Station wherefrom police came and took ashore the headless body and got the inquest done; and making a G.D. entry registered the Palasbari P.S. case No 93/99 The headless dead body was sent for post-mortem examination to the Gauhati Medical College Hospital where the body was identified..Subsequently the head was found floating a little downstream being obstructed by a stone. After lifting it the Palasbari police got inquest done and sent the head to the Guahati Medical College Hospital where it was put with the trunk and identified..Palasbari police tried to recover if anything was there at the riverbed at that place with fishing nets, but nothing else could be recovered. One eye of the head was found turned red with injury, and one cut injury on the backside of the thigh and the penis was reportedly found discoloured. While the body was found on 24.6.99, the head was found next day on 25.6.99. These were deposed by Shri Ruhini Buragohain O.C. Palasbari P.S. and Shri Naba Kumar Barua I.O. The I.O Palasbari examined some local villagers of the nearest Dakhala Colony who said that the sluice gate hasd been placed to control the water divided by the protruding Dakhala Hill into the Brahmaputra and the place was otherwise forlorn with a cremation ground; and the Brahmaputra embankment provides the motorable road. At that time the ernbankment was under repair and a labourer camp was set up there, at a short distance opposit the Dakhala Colony was the Hudumpara village, but it being a little interior from the embankment, they would not see the open space between the embankment and the sluice gate. So the Dakhala Colony people could see what happened on that open space on south bank of the Brahmaputra on the ridge of the Dakhala Hill. The Dakhala colony inhabitants said that often two Maruti Gypsies used to come between 9 P.M. and 11 P.M. to that spot, stop there for some time, and return. The vehiclrs would not like others to visit that spot during those hours. Once one Bimal, a master- roll labour, happened to be there and was asked by inmates of the two Gypsies as to what for he was there. When Bimal in turn asked them what brought them there, they replied that they came to offer *pūjas* there. On 22.6.99 a severed human leg was found floaring at that spot. On 24.6.99. Shri Parameswar Das' headless dead-body was found floating, and on 25.6.99 the head was found floating a little downstream obstructed by a stone. On 24.6.99 Shri Nagen Ch. Talukdar was entrusted by O.C. Palasbari P.S. to get inquest performed on the beheaded body and then it was taken to the Gauhati Medical College Hospital and Shri Talukdar had to stay overnight after the dead-body was identified to have been that of Parameswar Das of Hajo and post-mortem completed. On 25.6.99 the head being found, Shri Naba Kumar Barua S.I. Palasbari P.S. was entrusted with its investigation and he got the inquest completed and sent the head to the Guwahati Medical College where it was identified and put with the body of Parameswar Das. of Hajo and the dead-body was handed over to his relatives. Later the Palasbari P.S. case

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No. 93/99 was amalgamated with that of Hajo P.S. Case No. 107/99. Thus the spot has been of some doubtful repute.

(B) The identity of the killers, and their accomplices, if any

The killing of Shri Parameswar Das was secret not only as to time of killing, but also as to the identity of the killers and their accomplices. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea* or *negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. The identity of the killers and their accomplices, if any, has to be on the basis of evidence on record.

P.W 2 Shri Nripen Kumar Das who was the General Secretary of Kamrup District Students Union left AASU in 1996 and joined the A.G.P. In the 1996 General Assembly election Shri Nurul Hussain was a candidate from the Hojo Assembly Constituency, Shri Nripen Das was actively working for him, in course of which; he and Shri Nurul Hussain met in the house of a person at Laotali near Boranboi. Leaving him there, Shri Nurul Hussain left with few members of A.G.P who took him by a motor cycle to a house at Tetelia of Ketekibari wherein some ULFA members were there, namely, Shri Ramani Kalita @ Shri Gopbinda Boishya, Shri Parameswar Das, Shri Tarek Ali and Shri Gopbinda Deka were present, and with them Shri Nurul Hussain entered into an agreement with them to the effect that Shri Nurul Hussain agreed to support, inter alia, the ULFA demand for sovereignty of Assam, and the agreement was signed by Shri Nurul Hussain, and all the ULFA members for their organisation. As earlier arranged, at night the ULFA members remained there. Shri Nurul Hussain thereby won the election. In 1997 Shri Parameswar Das married Smti Malati Das and spent his days peacefully at home. In 1997 Shri Ajmal Ali, O.C. Hajo P.S. arrested Shri Parameswar Das as ULFA and detained him for three months. After release also Shri Parameswar Das continued his peaceful life devoting to agriculture. Shri Nripen Das said that sometime thereafter Shri Ajmal Ali O.C. Hajo came to Parameswar Das and asked for the copy of the aforesaid agreement saying that Shri Nurul Hussain wanted it, though the copy was not with Parameswar Das but with some other member of the group and those members also were not available by then.. Shri Ajmal Ali, perhaps thinking that the copy was still with Parameswar Das, used to come to Parameswar and harassed him.. Meanwhile Nripen Das was expelled from AGP and ceased to be in know of things therefrom. According to Shri Nripen Das, meanwhile Shri Parameswar Das had expressed before him that the very agreement copy might prove to be the cause of his death, because he had constantly been harassed by Ajmal. According to Nripen Das, whenever he met Parameswar Das he (Parameswar) used to express the same apprehension before him and also used to say that even Nripen Das might be victimised for the same, as secret killers might kill any innocent person on suspicion without any proof. Shri Nripen Das said that pursuant to the agreement the signatories thereof openly canvassed for Shri Nurul Hussain and by dint of that he won the election in 1996.. Meanwhile Nurul Hussain promised to provide some employment to Smti Malati Das, but nothing materialised till date Shri Nripen Das also expressed the apprehension that he too might have been expelled from the A.G.P. for reason of the same copy. In cross-examination Nripen Das said that he could not frequently go to console Smti Malati Das, except once or twice, as he himself had to be cautious for the same reason.

Nripen Das said that Shri Ajmal Ali, O.C. Hajo, advised him to help Nurul Hussain if he wanted to be safe from the secret killers. According to Nripen Das police very often visited Parameswar's house for obtaining the agreement copy.. Parameswar Das also told Nripen that police asked him (Parameswar) to point out ULFA locations, but he did not do so. To a question as to what could be the reason of killing of Parameswar, Nripen Das said that the agreement copy could be the reason. Answering a question as to what was the ULFA status of Parameswar, Nripen Das replied that Parameswar left the Organisation after formally informing it. Asked about his impression about the killing of Parameswar, the witness said that it could have been caused by some police-sheltered Sulfas of 10th A.P. Battalion at Kahilipara and Nalbari Police Reserves..

Shri Nurul Hussain received the information of Parameswar's killing only from newspapers and he thereafter went to his house and met and consoled his wife Smti Malati Das who told him that some assailants took her husband away in their vehicle. As M.L.A. from Hajo constituency and Minister in the A.G.P. Government he tried to provide Malati Das a job, but it did not materialise; and that as Minister for Co-operation he could not pursue the case particulars. Contradicting the statement of Shri Nripen Das as regards his having entered into an agreement with the ULFA during the 1996 general election, he said that it was false and that the same was not produced before the Commission. He asserted that he never entered into any such agreement and that the witness (Nripen Das) concealed his identity before the Commission not disclosing that he was the General Secretary of Halo Block Congress and that he was a SULFA. He resented the evidence as it might affect his image among his Hajo electorate. Replying to Shri P.K. Musahari Mr Nurul Hussain said that no such agreement was reported in the contemporary papers. He did not remember to have seen any allegation that Shri Parameswar Das was killed by ULFA, but he remembered that Parameswar Das was an ULFA and was leading an overground normal life. Shri Nurul Hussain replied that he heard the names of the persons with whom he was alleged to have entered into the said agreement, but he did not know them personally. He knew the place Tetelia as also Shri Kashyap Kalita's house which he visited; and that Kashyap Kalita worked for him in the 1996 general elections in which he won. Shri Hussain said that Shri Nripen Das was then in the A.G.P., but before the election, he was expelled therefrom. According to him, there were only one or two SULFAs in Hajo constituency. Answering a question as to whether some ULFAs worked for him during the 1996 elections, he replied that he did not know if some ULFAs worked for him. Shri Hussain denied the suggestion that he was concealing the matter of his agreement with the said ULFA members during the 1996 assembly elections. As he did not analyse the character and causes of several secret killings in Hajo constituency area, during 1998 to 2001, he could not make any comment on those killings.

Shri Ajmal Ali, the then O.C. of Hajo P.S. appearing in response to Notice u/s. 8B accompanied by the depositions of Smti Malati Das, Shri Nripen Das and Shri Bapdhan Das; and he (Ajmal) denies all the statements made, in those affidavits, concerning him. He received the ejahar of Smti Malati Das at 1.30 P.M. on the incident that happened at 11.30 P.M. on 22.6.99, and making G.D. Entry No.531 dt. 23.6.99 registered Hajo P.S. Case No.107/99, and took up investigation of the case. Reaching Malati's house at 2.05 P.M., he stayed there investigating up to 4.30 P.M. and thereafter recorded statements of 6 witnesses up to 12 midnight. Ajmal Ali quotes the following from, what he calls, the statement of Malati Das made before him: thus: "...the above boys were not ULFA and they are not Army and Police ...also I know almost all the ULFA and old/ earlier SULFA boys but those people were not from Army or police. They were not village people also.. From their behaviour, way of talking and from the way they carry themselves, they seem to be people

from towns" She also stated that she disclosed the story only that morning.(23.6.99) to her close relatives. Ajmal did not explain why the G.D. entry was made only on 23.6.99 though the ejahar was filed on 22.6.99 According to Ajmal Ali in connection with the Pallasbari P.S. Case No.93/99 registered on finding Shri Parameswar Das' dead body parts under that jurisdiction, Smti Malati Das stated under S.161 Cr.P.C. inter alia, : "Three persons wearing long pant and shirt and one person wearing long pant and ganzi had come and were wearing red ribbon on their heads. Then one of them asked "is your name Parameswar Das? Then my husband said that it was so. Then they said they have lost their way, and by holding him on his body took him away to show the way...One of the boys had pistol in his hand... I know many ULFAs and SULFAs. On the night of 26.6.99 I heard that the body was found.. I do not know whether my husband was taken by ULFA or SULFA" Ajmal Ali asserted that he did not forcefully lift him. Sri Parameswar was arrested in Hajo P.S. case No 46/97 and thereafter he reported to Hajo P.S. on 21.12.87, 2.1.98 and 3.2.98 but thereafter he ceased to report at the P.S. On 16.10.98 the D.S.P.(P) brought him to the P.S. from Bongsor and he was directed to continue his reporting in the P.S., and he actually reported on 18.10.98, 25.10.98, 26.10.98, 1.11.98, 14.11.98, 23.11.98, 20.11.98 and 5.12.98. Ajmal Ali denied Malati's allegation that the Hajo police in collaboration with the Army came to parameswar's residence and asked him to lead an expedition against ULFA and that in case of non-co-operation he would be imposed death penalty Ajmal said that he visited the house of Malati Das in course of investigation on, 12.6.99., 24.6.99, 25.6.99, 2.7.99 3.8.99, 4.9.99 and no further, and also denied having said Malati Das that Parameswar had abundant money and she would be able to live peacefully with it. Ajmal stated that it was not correct that he as O.C., while taking the F.I.R. that he put irrelevant questions such as whether the group that came to her home were ULFAs or SULFAs or did they belong to the Army etc. This shows the basis for what Malati Das is said to have stated under S.161 Cr.P.C before him.

From the above evidence on record, it would be reasonable beyond doubt to hold that the alleged copy of the agreement/resolution embodying the conditions of the pre-election agreement between the abovenamed Ulfas and Shri Nurul Hussain; was a factor; and the O.C. did appear to have taken active part in recovering the copy from Parameswar Das so as to create apprehension in Parameswar's mind that the copy of the agreement itself might prove to be his death warrant. Sans the recovery efforts to obtain the copy from Parameswar Das, all the imposition of the Tada case and the compulsion to regularly report to the P.S. and hunting him out after his reporting discontinued, does not appear to have been otherwise reasonable. The fact that the premonition of Parameswar Das ultimately came true, lent credence to the hypothesis. The efforts made by Shri Ajmal Ali to recover the agreement copy is explainable at least by the fact that Shri Nurul Hussain happened to be the M.L.A. and also a Minister in the then A.G..P. Government of Assam. When the Chief Minister himself published appeals to the ULFA families to bring their ULFA wards back to the main stream, and the entire State knew about it, and apprehending and killing Ulfas and members of their families resulted in betterment of their prospects of promotion and/or of better postings, it was only natural for the O.C. Hajo to try to better his prospects. For that it was necessary to obtain collaboration from effective sources and to maintain secrecy. Malati Das's statement that the assailants were from Town, was not specific.

On the basis of the above evidence on record, it would be difficult to determine the identity of the killers from the Town, but it may be reasonable to confine the identity of the accomplices to Shri Ajmal Ali. and Shri Nurul Hussain and the other persons who assisted, collaborated, and facilitated the killing of Shri Parameswar Das.

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(C)Whether there was any conspiracy in targeting Parameswar Das and the motive behind such killing.

This term is replied in two parts, namely, 1. Conspiracy in targeting, and 2. Motive behind the killing.

I. Conspiracy in Targeting the Shri Parameswar Das. Conspiracy in the context of the instant inquiry, will mean criminal conspiracy. which is defined in Section 126A of IPC as follows:-

“When two or more persons agree to do or cause to be done-

- (1) An illegal Act, or
- (2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing. As defined in Section 107 of the Indian Penal Code (IPC)

“ A person abets the doing of a thing . who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy , and in order to the doing of that thing ; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explanation -1. A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

Explanation -2 Whoever either prior to or at the the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act”.

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the killing of Subarna Rabha has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators? The persons who participated in the act of actual killing on the fateful night, must have been the same or their agents and accomplices and as such, there could be no other answer than that there was criminal conspiracy in the killing of Shri Parameswar Das..

There is evidence to show that some SULFAs of Sibsagar Town were enjoying protection from the police. This may have disabled the police from taking the right action against those SULFAs in this case.. Similar situation was found in case of Nalbari police sheltering SULFAs. Indeed the police- SULFA nexus has been submitted in arguments by the learned counsel for the Commission, the Government, and the parties. This means that those SULFAs emerged as an extra-constitutional authority. In case the SULFA were such a body of persons and were used by police either as an auxiliary, or as the striking arm, they would also be part of the conspiracy. . We have already discussed that as conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In

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the killing of Shri Parameswar Das, there were 5/6 persons in the act of killing. But there was a course of conduct involving the deciders of the course of action culminating in the killing. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of killing show that there must also have been some authoritative institutional assurance of safety to the killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being among the protectors against the victims they were bound to protect under the law, in this case.

II. Motive behind the killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence of P.W 1 that Shri Parameswar Das's widow Smti Malati Das deposed that there could be no reason for killing of her husband. Shri Parameswar Das was not in the ULFA. Therefore, there could be no doubt that the seekers of the copy of the agreement with the ULFA by Nurul Hussain could provide reasons for suspecting that the copy of the agreement itself could have led to the killing of Shri Parameswar Das. and the seekers thereof having been a part of the conspiracy. The fact that there was a request made to the literary organizations and Sahitya Sabhas of the State to persuade the ULFAs to surrender in the name of the then Chief Minister Mahanta, a course of conduct by different agencies towards similar persuasion finally culminating in this killing, support such a conclusion beyond reasonable doubt. Contemporary similar killings brought in evidence of this case also showed that it was the consistent pattern to follow. The way in which, and with which Parameswar Das has been killed leaves no doubt that the killers enjoyed complete immunity for their acts of killing. The way in which in this case, as in all other cases, under inquiry, the investigations were made to fizzle out and the F.R. (Final Report) was submitted shows that the police has been in collaboration with the killers. All these also prove that the entire scheme is being remote- orchestrated from the top of the department. Those in helm of the Departments must be held accountable and need be brought to justice. The matter being of criminal nature proof must be beyond reasonable doubt. The evidence in series of cases with common characteristics lead to such a conclusion beyond reasonable doubt.

The immediate motive of the killers could be any reward or satisfaction emanating from those who harboured the ultimate motive and engaged the killers. The desire of a consequence is the motive for an action. The member of the ULFA family has been executed brutally, for no fault of his, and only for his belonging to the ULFA family of Parameswar Das, that was, for a status offence without any sanction of law and in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. The motive was the perpetuation of the AGP rule in the State of Assam by villainy, treachery and monstrous cruelty and dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as - a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the killing will mean that for which the killer has committed the killing, and without which he would not have done it. We have to ascertain from the circumstances, anterior, present and posterior to the incident of killing. The anterior circumstances were that Parameswar Das was earlier in the banned outfit ULFA. There had been constant efforts in Assam to solve the insurgency problem created by ULFA and similar outfits in the region. Admittedly after leaving that organisation was living a peaceful life devoting himself to agriculture. But it seems police administration treated him more like an

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ULFA than as a peaceful agriculturist. There was no evidence of any trouble or demand from the side of ULFA. In the prevailing set up of contemporary atmosphere, Ulfocide seemed to have been related to prospects in service and promotion. Therefore what is evident was that Shri Parameswar Das was treated and troubled as an ULFA, and the effort to obtain the copy of the agreement had its impact on his assessment as ULFA. This aspect probalised the emerging of a police-Sulfa nexus constituting an extra-Constitutional authority and Ulfocide, as in majority of the cases under inquiry. This also leads to there having been conspiracy in the killing of Shri Parameswar Das. with a view to make Assam Ulfaleess. This reminds one of the concept of "Kshatriyaka katila Parasu kare dhari, nikshatriya karila samaste basundhari" (You have cut the Kshatriyas holding the parasu axe and made the land Kshatriyaless.)

(D) Pinpointing responsibility on persons involved directly or indirectly in commission of killing Shri Parameswar Das..

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is forthcoming in such extents as could help us in pinpointing responsibility on the persons involved.

Fortunately the term of reference mentions "involved directly or indirectly in commission of killing" This enables us to act on basis of integrated evidence rather than on isolated ones. We have therefore to integrate such parts of evidence as will lead to a conclusion beyond reasonable doubt, for pinpointing responsibility. Besides what are found in relevant pieces of evidence, the common characteristics found in each individual case also throw some light. We have, of course, to follow the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasonable doubt in this case.

The best evidence rule. "Phipson on Evidence," 9th ed. P. 51 under caption : "The Best Evidence Rule. Strict Proof" Says: "The maxim that "the best evidence must be given of which the nature of the case permits." has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P. 53) According to Phipson, "In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court".

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of seven cases is therefore is relevant and admissible.

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said:

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is

intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e, when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz, as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so.. The foundation of this is the probability or likelihood of that agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation, accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C. Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence.

The following common characteristics of the first group of seven cases are found in this case while answering its terms of reference. so as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely :

1. That this killing involved a treated as an ULFA family, being that of the Shri Parameswar Das who was earlier in ULFA. but left the organisation with permission and living a peaceful life.. This was clear when Shri Ajmal Aki allegedly told Smti Malati Das that Parameeswar had enough money with which she would be able to live happily. Of course, Ajmal Ali denied having said so.. and investigation of the case is kept pending, but no clue..
2. As in other cases, this killing, of Shri Parameswar Das was committed in the dead of night, and it was raining heavily at the time of kidnapping, as if to allow the assailants to escape under darkness.
- 3.. The assailants tied their foreheads with red ribbons to avoid being identified.
4. The weapon used in killing was a sword, dao or any sharp cutting instrument.
5. The sharp cutting weapons were not recovered, so there was no forensic examination thereof was made...
6. The vehicle used was never seized or taken into custody. .
7. There was no mention of police patrolling in the crime areas prior and posterior to, or during the killing.
8. That the army was ubiquitous. There was lurking evidence of Police-SULFA nexus in the killing, some of the latter being constituted into an extra-constitutional authority and

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used as the executioners. the *modus operandi* being to visit the family, to send advance team to locate and survey the house, then to send armed and masked persons to shoot /them dead or take them away and kill them secretly by shooting and/or cutting and throw the bodies somewhere..

9. There was general resentment and decry against the Unified Command Structure/ then Chief Minister..

10. There was connivance of SULFA; and omission to make any SULFA an accused, despite clues..

11. The investigation did not commensurate with the seriousness of the crime perpetrated..

12. That modern scientific methods of investigation, finger/foot prints, dog-squads were never used.

13. No condolence message was sent from the then Govt. of Assam to the victim family.

14. No ex-gratia/compensatory payment was made or offered by the then Govt. of Assam. in this case.

15 In this case death penalty had been imposed for "status offences," on Parameswar Das

for being a member of ULFA family of the erstwhile ULFA Shri Parameswar Das...

15 That in all the cases, including this case of Parameswar Das there was remote orchestrated Ulfocide, death penalty having been imposed on the victims for "status offences," of earlier being members of ULFA.. These common characteristics, along with evidence, prove, beyond reasonable doubt, remote orchestration of "Ulfocide" from "Home Ministry" , through Police-SULFA nexus using some Sulfas as the striking arms or executioners. ..

16. From this case "remote orchestration" and principle of "kill and get killed" are deducible. The remote was supposed to be at Home Minister level.

This conclusion is based on the similarities of the seven cases in almost all respects, which could not be so, unless there was remote orchestration from higher authorities.

On the basis of the above evidence on record, it would be difficult to pinpoint the responsibility of the persons involved directly or indirectly on the alleged people from the Town, but it may be reasonable to pinpoint the responsibility of being indirectly involved in the killing, or of being accomplices on Shri Ajmal Ali, then O.C. Hajo P.S., and Shri Nurul Hussain and the other persons who assisted, collaborated, and facilitated the killing of Shri Parameswar Das..

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(1) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure. which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/ requisition by the State Govt. The Structure itself envisages its review after every three months; and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para

14 of "Part I. INTRODUCTORY." of this report and is referred to in this context. The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire, first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

The Army Districts. In para 15 we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union

Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; ammunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions would not countenance violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitions and/or some Ulfa related papers are put near the dead bodies. obviously for post mortem justification of the killings This will not stand on the way of the spade being called a spade...

28. Right of Private Defence and Encounter.. The English law excuses a person who has been

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the

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Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" Sukracharya's *Dandaniti* is based on *danda*, meaning, punishment. Ancient sages said that without *danda matsyanyaya* will prevail and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical. or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner..While no training course will be appropriate, considering their exalted position and prestige, periodical periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea..their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters", trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the

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insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law.

So far as the Government wings, agencies, and authorities, both official and political, the principle of "respondeat superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional, legal and human rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle should be followed and the political persons also be given fair field and no favour in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

This case deserves to be revived and re-investigated.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the bread earning patriarch of the family has been shot dead under the circumstances discussed in the case. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, including the minor children of the bereaved family. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to the widow of the victim, Smti Malati Das, for the benefit of the family, a sum of Rs 5,00,000/- (Rupees Five lakhs) only forthwith. More than six years have already elapsed, and it brooks no farther delay.

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SHRI HIRAN DEKA KIDNAPPING AND DISAPPEARANCE CASE**Sarupathar P.S. Case No.230/99****Date of Occurrence 18.8.99**

By this Commission's order dated 5.4.2006, by virtue of the authority conferred on it by the Government of Assam's Notification Nos. No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No. No.PLA 331/2005/1 dated 22.8.2995, after hearing the applicant and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry, with notice to the State Government. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case, the following terms of reference, and any other related and relevant matters with recommendations, if any, namely:

“(a) Circumstances, in each case, leading to the killing of its victim(s).

(b) Identity of the killer(s) and accomplice(s), if any.

(c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s).

(d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killing(s)

(e) To make recommendations to prevent recurrence of such killing(s)

(f) Any other matter related to or relevant to the purpose of this inquiry;”

(A) Circumstances leading to the killing of Shri Hiran Deka.

Shri Hiran Deka was kidnapped by four armed miscreants in a black Maruti Fypsy on 18.8.99 and since then his whereabouts and condition is not known. He has not communicated to any of his relatives till the last date of hearing of this case and thus has Hiran Deka was kidnapped by the four armed miscreants in a black Maruti Gypsy not been heard of by any of those who would normally have heard of him. However, none has informed that he is no more. There has been no evidence that he has been killed or that he is dead.

This Commission has been appointed to enquire into killing cases during the period of 1998 to 2001. Many of the secret killing cases start as kidnapping and later as killing case when killing of the kidnapped person is known to be killed. Sometimes in a killing case the dead body is the corpus delicti and is found or proved. In this case the corpus delicti has not been found. However, this case in many respects is akin to the secret killing cases of the period under enquiry. More than 7 years have elapsed and yet no trace of the then only 16 years trying to contribute his mite to the family by running a small grocery shop. The miscreants first enquired of his elder brother Shri Mukut Deka who was a known Ulfa, and not finding him imposed status penalty on him for having been related to his Ulfa elder brother. Police witnesses pleaded ignorance, and hence could not be asked whether the boy is still alive..It has been taken up by the Commission as of the nature of a killing case.

somehow later it came to be considered as one of killing and thus included in the list of cases referred to this Commission, At the outset it is made clear that this Commission is only a fact finding body and not a civil Court. Therefore, it cannot give any declaration of death. Such a declaration will involve questions of succession and inheritance of their estates. Accordingly

civil Court is the proper forum for that purpose. However, the Commission can, on the basis of evidence arrive at a finding on the deaths as facts. But the Commission may not be justified in arriving at such a finding without proof of the corpus delicti, i.e., that the killing has been done by someone. Such a finding may be justified if the body of the person alleged to have been killed is found, or there is evidence either direct or circumstantial, of the death of the person alleged to have been killed. If the evidence is circumstantial, it must be so cogent and compelling as to convince that upon no other rational hypothesis than being killed the facts be accounted for. In the absence thereof, the question will be whether a presumption of fact of death could be drawn. Passage of time from his last being seen is one of such circumstances. The time varies from country to country. Since death involves question of rights the period should be safely decided. To take guidance from English law, W.M. Best on "The Principles of the Law of Evidence", 9th ed, p.344. S.409 writes:

"The fact of death may, however, be proved by presumptive as well as by direct evidence. When a person goes abroad, and has not been heard for a long time, the presumption of the continuation of life ceases at the end of seven years from the period when he was last heard of. And the same rule holds generally in respect to persons who are absent from their usual places of resort, and of whom no account and for whom no account can be given. But there is no fixed limit of seven years." This period of seven years is based on English statute. Where question of property rights are involved, it is reasonable to wait for a period applicable thereto. For example, The Presumption of Life (Scotland) Act, provides for the period of thirteen years. Phipson on Evidence (9th ed. P.701) writes that "in one case the Court refused to presume death from unexplained absence under suspicious circumstances after twenty years." (Re. Lidderdale, 57 S.J. 3) Accordingly, we may wait for twelve years or so unless otherwise proved earlier. In the instant case, the two youths were last seen at the Madhav Dham at about 11.45 P.M. on 28.9.1999, being dragged forcibly into one of the two white Maruti zypsies, and no more thereafter. The abductors were evidently believed to have been prowling secret killers, who could, therefore, be taken to have caused their disappearance. From 18.8.1999 till date, nearly seven years have elapsed. Considering all the above circumstances, a presumption of the facts of deaths of the youth, namely, Hiran Deka may not now be reasonably drawn; and so it is found as a fact.

(B) The identity of the kidnappers and their accomplices, if any

The kidnapping of Shri Hiran Deka was secret not as to time of kidnapping, but as to the identity of the kidnappers and their accomplices. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who, being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea* or *negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. The identity of the kidnappers and their accomplices have to be determined on basis of the evidence on record. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who, being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea* or *negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. We discussed the meaning of "secret". In para 7 of the

Introductory Part 1. Identification of the kidnappers has to proceed on the basis of investigation and evidence, wherefrom, as submitted by Dr. Y.K. Phukan and Mr. P.K. Musahari, two shortcomings appear from records, namely, that only routine investigation proceeded; modern methods were not used; police dogs were not engaged, to sniff out the culprits; foot or finger prints were not taken. Investigation was perfunctory, as important evidence were not taken promptly or not at all.

P.W. 1 Shri Mukut Deka, elder brother of Hiran Deka, who was an ULFA Publicity officer, but has since surrendered, after the incident said that his younger brother Hiran Deka was running a small shop at Sarupathar Block Tinali. On 21.8.99 he (the witness) was in ULFA but within the Golaghat district towards Jurhat side, till he surrendered on 26.1.2001 before the then Governor Lt. General S.K. Sinha and the then Chief Minister Shri P.K. Mahanta. On 21.8.99 his younger sister Smti Deepali Deka lodged an FIR.. She is now married and his parents are old and infirm enough to participate in the inquiry. While in ULFA he was the publicity secretary of its Dayanf Anchalik unit. He said that he himself was not pressurised by army or police, the members were pressurised in different ways. Army and police used to frequent their house and used to ask his whereabouts, and the members were brought to the police station and held in custody for days at a time pressurising them to make me surrender but they had no contact with me. There were about 24/25 Ulfas in Sarupathar area at the time of his surrender and about 10/12 Sulfas including 1, Shri Lila Saikia of Sarupathar Sewaguri village, 2, Shri Bangsi Mahanta of same village, 3, Pradip Chutia of same village, 4, Shri Naba Bara of Sarupathar Betonigaon. 5 Shri Gutti Gogoik and Biku Barua of the same village.

N.W. 5 Shri Brajenjit Singha was the Addl S.P.(HQ) Goagjat district, but he was on leave w.e.f. 19.8.99 and was in Guwahati and returned on 24.8.99 and from 25.8.99 he was with the Hon'ble Chief Minister's programme at Bokakhat and from next day he was supervising another serious case of murder of a college student. Mr. Singham of course, admitted that thereby his duty to supervise this case did not end. He explained that this case was supervised by the S.D.P.O, Sarupathar Subdivision who was a senior officer. Even so, he having been the Crime officer of the district, could not disown his responsibility in this case. He did not go to Hiran Deka's house, but supervised operations undertaken by S,D,P,O, Sarupathar, who was his batch-mate. Asked why no high officer ever supervise the investigation of the case, witness replied that it could not be said that inasmuch as all serious cases are discussed in the quarterly crime review meetings, and this case also must have been discussed, but he could not show whether the crime review minutes are to be in the records of the cases or that crime review proceedings amounted to giving supervisory notes. He admitted that it was the rule that all investigation steps are to be recorded in the case diary, but said that verbal instructions are often not recorded in Case Diary..

To a question whether seeing that the investigation of the case was not proceeding in the right direction it was his duty to issue proper instructions, he admitted that it was his duty but also said that the crime review proceedings are supplied to the O.C. also and should have gone to the I.O for record. The suggestion given was that the witness knew that the vehicle used by the assailants was a black Maruti Gypsy and the four persons who came were also from the area and knowing this the investigation was to hush up the truth and therefore nothing was done by way of investigation and nothing important was recorded in the case diary, the answer was "I do not agree because no one will like to do that type of deliberate mistake as it would be like digging his own grave."

N.W 3 Shri Jogendra Nath Deka was an Attached Officer in Sarupathar P.S. on 18.8.99 and was entrusted with the investigation of the case with his staff and the C.I he

proceeded to the place of kidnapping, the shop being about 2 k.m from the P.S. and interrogated some neighbouring shop owners who told that four miscreants came in a black coloured Maruti Gypsy vehicle from the eastern side and asked some of the shop owners which was the shop of Shri Mukut Deka who was an ULfa and was told by the shop owners that Mukut Deka had no shop there, but his brother had one and pointed it out. That shop being closed,; and Hiran being not present, he was called in by the neighbours and on his arrival, he was called to the black Maruti Gypsy, and two miscreants got down, each holding firearm of 2' long, asked Hiran Deka to get in and Hiran Deka did so without speaking anything, and shutting the door it drove away towards Barpathae. The I.O. prepared a sketch of the P.O and proceeded to Barpathar P.S. and asked them whether they saw the vehicle and requested them to inform if they came across the vehicle of the miscreants. Returning therefrom, I/O. went to the house of Hiran Deka at interior Padumani but nobody was there. Thereafter coming back he circulated the information to all Police Stations alerting them of the incident. He was at Sarupathar P.S. about a year thereafter he was transferred out of Sarupathar. interrogated some persons under s.161 Cr.P.C. but no clue was found. The C.I. gave him verbal instructions on investigation.

In cross the I.O. stated that he examined some of the eye witnesses including the person who called in Hiran Deka to his shop, and admitted that in the statement he recorded under S.161 Cr.P.C. Shri Babul Deka, Shri Sanjib Saikia and Shri Benuchand who were eye witnesses stated that the assailants spoke in Hindi and that the vehicle used by the miscreants was a black coloured Maruti Gypsy. Asked how was it that in the message circulated by him, the vehicle used by the miscreants was described as a Maruti van, he replied "I have no explanation to this." He said that two of the three eye witnesses said that they did not see the registration number of the vehicle and that he did not ask them if they would be able to recognise the miscreants and the vehicle if produced before them. Asked why did they frequently raided houses of ULFAs knowing fully well that ULFAs do not remain in their houses, the I.O. replied: "Sometimes ULFA may have come and moreover from our higher authority they always enquire as to whether we have been raiding ULfa's house or not and we have to show that we have raided." Explaining why after the entry dated 28.8.99, the next entry was dated 17.3.2001, the I.O. said as nothing important was found, so no entry was made, though investigation was there, He did not remember whether the D.S.P.(HQ) Golaghat district was allotted a black Maruti Gypsy, and he did not enquire at D.T.O.'s office as to who owned black Maruti Gypsies in Golaghat. He denied the suggestion that he knew that police and some Sulfas came in the police black Maruti Gypsy and therefore he made an eye was of the investigation, put it in a wrong track calling it a Maruti van without mentioning the colour, and allowed it to fizzle out. He also denied the suggestion that the higher authorities directed him not to proceed seriously as the brother of an ULFA was the victim and accordingly he slackened it.

Shri Pabin Chandra Tamuly was the I/C of Sarupathar P.S. and received the case diary from I.O Shri Jogendra Nath Deka, I.O, on his transfer. and reendorsed it for investigation to SI. Shri Premananda Bora, thereafter Shri Tamuly retained O.C. of the P.S. up to up to March 2003. He did not know much about the case, the investigation having been guided by the C.I. The final Report in the case was submitted on 16.5.2003 and was accepted by S.D.J.M. Sarupathae on 6.11.2003.. The I.O. did not discuss anything on the case with him and he did not issue any instructions. The I.O. told him that there was no clue. He did not go through the case diary as only in serious cases diaries are gone through by the O.C. As the I.O. told him there was no clue, he took it and also found no clue in the statement of Smti

Deepali Deka. There was no entry in this case diary during his tenure as O.C. He appeared to have played safe of this case.

N.W. 2 Shri monmohan Deka Joined Sarupathar P.S. on 1.3.2003 and was entrusted with investigation of the case.. On 10.5.2003 he started investigaion and finding no clue submitted the F.R.(Final Report) on 16.5.2003 as no further clue was available.He engaged sources who told him that the miscreants tied their faces with black cloth and they came in a white MarutiGypsyin civil dress. He felt that it was a although his elder brother was at that time in ULFA Sigificantly he said: "I feel some SULFA of that area of Gollaghat district are in the case." Asked who was the I.O of the Sarupathar P.S. cse No. 55/99 Shri Monmohan Deka said:"In fact Shri Premadhar Bora was the I.O. of this case But as he was treated as missing because he did not report to duty nor handed over the C.D. to the O.C. Shri Mizanur Rahman was appointed the O.C. and he entrusted me the case.. I started investigation this case from a copy of CD which was found in the office as the original C.D. was not available". He considered what was there was sufficient as the case was already 4 years old. So he agreed to the Progress Report submitted by C.I. Asked whether they suspected Mukut Deka to have ben involved in the killing case of a Marwari businessman, and ambushment of some army personnel, but there was no sufficient evidence to establish those involvements, so those were not pursued. not pursued. Asked why the clue given by Babul Deka and other eye witnesses was not pursued, Shri Monmohan Deka said that it could also be that Sulfas and police informers expecting appointments in the department joined their hands and tried to have such persons and particularly when they were holding arms. the boy could not have either tried to run away or to protest or speak something before them and that is why he voluntarily boarded the vehicle but he had no other way to do. That is why he did not think it sufficient to find a clue, over and above what his predecessor found zas clue. It was also quite possible that some of the Sulfas who came in the vehicle may have visited their house and Hiran might have even known them. Asked whether he examined some of the Sulfas and some informers who could have been there to find a better clue, the witness replied Besides, he said, the case was already 4 years old, the complainant lost interest in it, "and also those Sulfas and the people who helped them, when asked, expressed unwillingness to disclose the real thing.. On the other hand they wanted to say that it was an act of police only." The witness interrogated some of the Local Sulfas, Shri Padma Lahan, one Shri Konwar of Padumani and one Shri Atul Gogoi. "This Atul Gogoi admitted thathe, along with some SULFAs were involved in this incident and he is now believed to be at Sonari.

He did not ask them what they did with Hiran, but said:" I believe that he must have been killed and buried somewhere" The following cross examination followed:

Q. Is it a fact that the ULFAs were doing all these as required of them by police?

A. It could be at higher level, that is above the rank of C.I. and up to the highest."

Q. Is it a fact that the police administration itself egaged SULFA groups to act in the way they wanted ?

A. Yes, it is known to all.

Q. As we find reports that in all these killings the SULFAs used arms. Wherefrom they could get those arms?

A. Yes. Unrecorded recovered arms are supplied to the SULFAs" .

N.W. 4 Shri Anil Kr. Saharia was the S; P., Golaghat district from from September 1996 to to February 2000 On 21.8.99 he received a telephone call from Sarupathar P.S. that Shri Hiran Deka, brother of ULfa Shri Mukut Deka was kidnapped by some unknown armed miscreants and carried through a light vehicle. Before that he was informed by some officer of that P.S. that the case was already entrusted to S,I, Shri J.N. Deka, by the O.C. and it was being supervised by the C.I., Sarupathar P.S. Later in the month C.I Sarupathar informed that no clue was found..The S.P. did not remember what oral instructions were given by him, but remembered that no written instructions were given by him He was transferred out of Golaghat in February 2000. There were four D.S.P.s, one at Sarupathar, one at Bokakhat and two at Golaghat. The S.D.P.O, Sarupathar was Shri Bibekananda Das. Shri Mugdha Jyoti Mahanta was D.S.P.(HQ), Golaghat. Shri Brajendrajit Singha was the Addl S.P.(HQ), Golaghat districe. All Gazetted police officers were provided with Maruti Gypsies, but he did not remember whether a black coloured one was provided to Shri Mugdha Jyoti Mahanta. According to availability, the O.C.s were also provided Gypsies. There was a camp of a C.R.P.F. company at Sarupathar, a little away from the Town. Being under the Unified Command Structure, they were to work on requisition from Police, but in urgent cases they could work of their own. S.P. utilised the services of Shri Mugdha Jyoti Mahanta as a young officer detailing him for law and order duties in the district. There was one Army camp at Bokakhat for National Highway and Kaziranga dignitaries duty, but they were not utilised for law and order duties. According to the S.P. Sarupathar subdivision having 25/30 Ulfas, was ULFA infested one and several anti-insurgency operations had to be undertaken there, but none could be apprehended There was perceptible pressure and guidelines from higher authorities for apprehending Ulfas, and the operations formed part of the guidelines to contain Ulfas in Golaghat district. .

"Q. Did consistently with the guideline from the above exert some sort of influence or pressure on the members of the ULFA families to try to bring back their family members who joined the ULFA back to the main stream and lead normal life giving up violence?

A. Yes, pursuant to the guidelines from the above we did put pressure on the ULFA families members and sometimes we also arrested and brought them for interrogation and advice to bring their ULFA members back to the main stream , that type of psychological pressure was put upon them."

The S.P. said that despite no surrender took place during his tenure, but later he learnt about some surrenders. He said that in all serious cases Hiran Deka's elder brother Mukut Deka who was the Dayang Anchalik unit publicity Secretary of ULFA was suspected and that a little before this incident one business man was killed and ULFA was suspected. Hiran Deka's father and sister were earlier brought to the P.S. and interrogated, and surveillance over the family was made stricter. All these were indicative of the Police attitude towards their family members. Asked how was that in face of the clear and categorical statement made by the neighbouring shopkeepers, while examined under S,161 Cr.P.C. said that the four assailants came in a black Maruti Gypsy and two of them got down and going near the shop asked whether that was Mukut Deka's shop, in the police signal calculated the vehicle was stated to be a Maruti van and not Maruti Gypsy, S.P. replied that it might be because in the FIR Maruti van was mentioned. On being asked whether any subsequent clarification was given, witness said no. Shri Saharia stoutly denied the possibility of the operation of kidnapping was by the army or the C.R.P.F. but said, it could have been by some person aggrieved by Mukut Deka's actions.. However, the CD did not record anything on that hypothesis. It was seen that the S.P also described the vehicle as "light vehicle" and

did not remember whether the D.S.P.(HQ) was allotted a black coloured Maruti vehicle. But the officer himself said (in another case) that his vehicle was a black Maruti Gypsy. Witness denied the suggestion that the police itself was involved and that is why none took interest in investigation of the case.

The S.P. had good opinion about the prominent Sulfas of Sarupathar area like 1. Shri Lila Saikia. 2. Shri Gauri Gogoi. 3. Shri Prodip Chutia 4. Shri Naba Bora and few others, and he never thought of their having anything to do with the incident. He also admitted that he had not supervised the investigation of the case at all and did not see its case diary and nobody brought it before him.

N.W. 4 Shri Mugdha Jyoti Deb Mahanta, then D.S.P(HQ) Golaghat district, deposed that he did not play any role in investigation of the case; and no investigating officer of the case came to him to consult about the investigation of the case. It was correct that he was sent by the S.P. for operation in Sarupathar, but not in this case, as there was an experienced S.D.P.O. at Sarupathar. Asked about the statement that Hiran Deka walked into the kidnappers' vehicle almost of his own and without any protest, he said that Sarupathar P.S. and No. 1 Padumani Block were very near and, therefore, it was likely that they were known to the police personnel and police vehicles. This statement seems to have been based on the fact of the kidnapping vehicle and the personnel having been from police station. Regarding the kidnapping Shri Mahanta said that on 21.8.99 he was informed by someone of Hiran Deka's family along with one Mahanta that while he was at Golaghat office

Shri Hiran Deka was kidnapped, and that Hiran almost walked into the kidnapping vehicle which sped away towards Barpathar. He did not enquire about the incident as one senior S.D.P.O. Shri Bibekananda Das was there at Sarupathar. This indicated that Shri Mahanta was well acquainted with Hiran Deka's family. This was also corroborated by the fact that after Hiran's elder brother Shri Mukut Deka surrendered in 2001, he came to Shri Mahanta he told Mahanta that he (Mukut Deka) had some information that Shri Hiran Deka might be at Barpeta, and, therefore, he requested Mahanta to give something in writing so that he could go and inquire about Hiran Deka there with the help of Barpeta police., but he did not say whether he gave anything in writing. Thereafter, he lost track of the case as he was transferred as Addl S.P.(HQ), Tinsukia. Shri Mahanta said that Shri Mukut Deka sent him a filler being inclined to surrender, but was advised to wait, and then he surrendered in 2001 along with 40 others. Before surrender Mukut Deka's younger sister's birthday ceremony was performed and Shri Mahanta, on invitation from Mukut Deka attended the ceremony in uniform, but no Sarupathar policeman attended..Police had the information that Mukut Deka used to visit his priest at Deopani in Karbi Anglong. and that his (Mukut's) operation area included Golaghat, Karbi Anglong and Jorhat districts

On the basis of the above evidence, it is considered reasonable to confine the identity of the assailants to Sulfas Shri Atul Gogoi and his associates in collaboration with the local police personnel and the accomplices to all the police personnel who abetted, helped and facilitated the kidnapping, Shri Mugdha Jyoti Deb Mahanta having said that Mukut Deka received some information about Shri Hiran Deka being alive and staying somewhere in Barpeta. But then nothing has been heard about his really living there. Shri Mukut Deka himself did not state anything about it before the Commission. As Shri Monmohan Deka, O.C. deposed, if the boy has really been killed and buried somewhere, the same persons involved in kidnapping will also be held responsible for killing Hiran Deka, and the abettors and collaborators shall be the accomplices in the killing.

On the basis of the above evidence on record, the identity of the killers may reasonably be confined to the Golaghat District Police administration and the police protected Sulfas of Gollaghat and Bagarijeng for the reason that the family of Hiran Deka was frequently visited by the Golaghat police and his father and even the younger sister were brought to the Dsrupsthr P.S. for interrogation, and the fact that the Maruti Gypsy used by the assailants was a black coloured one and Golaghat police admittedly had some such Gypsies.

(C)Whether there was any conspiracy in targeting Hiran Deka and the motive behind such killing.

This term is replied in two parts, namely, 1. Conspiracy in targeting, and 2. Motive behind killing.

I. Conspiracy in Targeting the Victim. Conspiracy in the context of the instant inquiry, will mean criminal conspiracy which is defined in Section 126A of IPC as follows:-

“When two or more persons agree to do or cause to be done-

(1) An illegal Act, or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing. As defined in Section 107 of the Indian Penal Code (IPC)

“ A person abets the doing of a thing . who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing. if an act or illegal omission takes place in pursuance of that conspiracy , and in order to the doing of that thing ; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explanation -1. A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

Explanation -2 Whoever either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act”.

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the kidnapping/killing of Hiran Deka has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators? It is in evidence that the family members of

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Hiran Deka were requested by various Govt. agencies to persuade their elder brother Shri Mukut Deka, who has been an ULFA, and were forewarned by the CRPF and police that if Mukut Deka could not be persuaded, by them to join the peace talks and bring peace, the consequences would not be good for the family. The persons who participated in the act of actual kidnapping on the fateful day, must have been the same or their agents and accomplices and as such, there could be no other answer than that there was criminal conspiracy in the kidnapping/ killing of Hiran Deka..

There is evidence to show that some of the Sulfas were enjoying protection from the police. and also had expectation of future employment in return for their services rendered to police.O.C. Shri Manoranjan Deka's evidence is indicative of such expectation. and also of police involvement in the incident. This may have disabled the police from taking the right action against the SULFAs involved in this case. Similar situation was found in case of Nalbari police sheltering SULFAs. Indeed the police- SULFA nexus has been submitted in arguments by the learned counsel for the Commission, the Government, and the parties. This means that the involved SULFAs emerged as an extra-constitutional authority. In case the SULFA were such a body of persons and were used by police either as an auxiliary, or as the striking arm, they would also be part of the conspiracy. . We have already discussed that as conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In the kidnapping/killing of Hiran Deka there were 4 persons in the act of kidnapping, but there was a course of conduct involving the deciders of the course of action culminating in the kidnappingkilling. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of kidnapping/killing show that there must also have been some authoritative institutional assurance of safety to the kidnappers/killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being among the protectors against the victims they were bound to protect.under the law, in this case.

II. Motive.behind the kidnapping/killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence that there could be no other reason for kidnapping/killing of Hiran Deka except for that his elder brother Shri Mukut Deka was in the ULFA. This evidence was not challenged in cross-examination. Therefore, there could be no doubt that forwarners having been a part of the conspiracy .The then Chief Minister published press appeals to the members of ULFA families to persuade their ULFA members to give up path of violence and surrender, the CRPF and the police accordingly advised the family, and also forewarned that consequences of failure to do so would not be good for the family and persuaded the members of Hiran Deka's family in that line. The fact that there was a request made to the literary organizations and Sahitya Sabhas of the State to persuade the Ulfas to surrender is knowb to all. A course of conduct by different agencies towards similar persuatuin and the forewarning that in case of failure to effect surrender consequences would not be good for the family of Hiran Deka, and thereafter finally culminating in his kidnapping support such a conclusion beyond reasonable doubt..The S.P himself admitted of there having been ppressure for maintaining constant pressure on the ULFA families.The black Maruti Gypsy was being used by the miscreants. Contemporary similar killings brought in evidence of this case also showed that it was the consistent pattern to follow. One may question why, in face of the constitutional and legal right for every citizen to freedom of thought and belief, freedom of association, the relatives need be so pressurized to bring their wards back to peace talks, and why relatives who failed to do so should be mentally and physically tortured and reign of terfror let loose and when

even then they failed, they should be kidnapped/killed.? The way in which, and with which Hiran Deka has been kidnapped, and perhaps killed, leaves no doubt that the kidnappers enjoyed complete immunity for their acts of kidnapping/killing. The way in which in this case, as in all other Golaghat cases, the investigations were made to fizzle out, even the original case diary lost for good, and the F.R. (Final Report) was submitted, shows that the police has been in collaboration with the kidnappers. All these also prove that the entire scheme is being remote- orchestrated from the top of the department. Those in helm of the Departments have to be held responsible and need be brought to justice. The matter being of criminal nature proof must be beyond reasonable doubt. The evidence in series of cases under inquiry with common characteristics lead to such a conclusion beyond reasonable doubt. .

The immediate motive of the kidnappers could be any reward or satisfaction like promotion or better posting, emanating from those who harboured the ultimate motive and engaged the kidnappers. The desire of a consequence is the motive for an action. The member of the ULFA family has been executed brutally, for no fault of his, and only for his belonging to the ULFA family of Mukut Deka, that was, for a status offence without any sanction of law and in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. The motive was the perpetuation of the AGP rule in the State of Assam by villainy, treachery and monstrous cruelty and dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material.. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as - a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the kidnapping will mean that for which the kidnappers have committed the crime, and without which he would not have done it. We have to ascertain from the circumstances, anterior, present and posterior to the incident of kidnapping, The anterior circumstances were that Shri Mukut Deka was one of the banned outfit ULFA There had been constant efforts in Assam to solve the insurgency problem created by ULFA and similar outfits in the region. Use of force attained limited success Some of the extremists have left the country and have taken shelter in foreign countries. Their whereabouts being not known to the anti-insurgency authorities. one possible way was to request the members of the foreign sheltered leaders of the banned outfits and request them to exercise their relationship influence to give up the path of insurgency and come to the normal stream in the country. None could find any fault in such efforts. That such a move was there in case of Mukut Deka is evident in this case. However, if undue influence, coercion, or violence is resorted to, that may be illegal, punishable and violative of fundamental and human rights. More so when kidnappings are resorted to as in this case, and the boy is not to be seen any more.

(D) Pinpointing responsibility on persons involved directly or indirectly in the kidnapping.

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is forthcoming in such extents as could help us in pinpointing responsibility on the persons involved.

Fortunately the term of reference mentions "involved directly or indirectly in commission of killing" This enables us to act on basis of integrated evidence rather than on isolated ones. We have therefore to integrate such parts of evidence as will lead to a conclusion beyond reasonable doubt, for pinpointing responsibility. Besides what are found in relevant pieces of evidence, the common characteristics found in each individual case also throw some light.

We have, of course, to follow the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasonable doubt in this case.

The Best Evidence Rule. "Phipson on Evidence," 9th ed. P. 51 under caption : "The Best Evidence Rule. Strict Proof" Says: "The maxim that 'the best evidence must be given of which the nature of the case permits.' has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P. 53) According to Phipson, 'In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court'".

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of seven cases is therefore is relevant and admissible,

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said:

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e., when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz, as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so.. The foundation of this is the probability or likelihood of that agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation, accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C.

Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence.

The following common characteristics of the first group of seven cases and the second group of eight cases are found in this case while answering its terms of reference so as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely :

1. That this kidnapping/killing involved an ULFA family, being that of the ULFA Shri Mukut Deka and its investigation fizzling out, no clue, and case returned in F.R.(Final Report.)...

2. Unlike in other cases, this kidnapping, of Hiran Deka, were committed in the broad day light, without caring for the police and law and order machinery.

3.. The assailants spoke in Hindi to avoid being identified.

4. The weapons carried by the assailants, 2feet long, may be A.K. 47 rifles or Carbines of prohibited bores generally found in police-military situations

5. The firearms being of prohibited bores, were not seized and their forensic examination was avoided...

6. The vehicle used was reportedly a black coloured Maruti Gypsy was not located or seized. In all probability was a police vehicle, as the D.S.P.(HQ), Golaghat district had such a vehicle. However there was no evidence that it was the same vehicle.

7. There was no evidence of police patrolling in the crime areas prior, posterior to, or during the kidnapping..

8. That the army was not camping in the area. There was lurking evidence of Police-SULFA nexus in the kidnapping, some of the latter being constituted into an extra-constitutional authority and used as the executioners. the *modus operandi* being similar to other ULFA killing cases.. In this case kidnapping was before noon in broad day light..

9. There was general resentment and decry against the Unified Command Structure/ then Chief Minister..

10. There was connivance of SULFA; and omission to make any SULFA an accused despite clues pointing fingers towards some of them..

11. The investigation did not commensurate with the seriousness of the crime perpetrated..

12. That modern scientific methods of investigation, finger/foot prints, dog-squads were never used.

13. No consolation message was sent from the then Govt. of Assam to the victim family..

14. No ex-gratia/compensatory payment was made or offered by the Govt. of Assam in this case.

15 In this case penalty has been imposed for "status offences," on Hiran Deka for being a member of ULFA family of the ULFA Shri Mukut Deka...

16 That in all the cases, including this case of Hiran Deka there is remote orchestrated kidnapping/Ulfocide, and if the boy has been killed, death penalty having been imposed on the victim for "status offences," of being member of ULFA family, that of Mukut Deka..

16. That from evidence of this case, as in all other cases, "remote orchestration" of

"Ulfocide", if the boy has been killed as said in evidence, is deducible. These common characteristics, along with evidence, prove, beyond reasonable doubt, remote orchestration of "Ulfocide" from "Home Ministry", through Police-SULFA nexus using some SULFAs as the striking arms or executioners. The authority has to be held liable and be dealt with according to law. This case deserves re-investigation on revival. This conclusion is based on the similarities of all the cases in almost all respects, which could not be so, unless there was remote orchestration from the highest authority. The remote was supposed to have been at the Home Ministry.

Questioned on the two cases, namely, that of killing of Dimba Rajkonwar and that of Dr. Dharanidhar Das and family, Shri G.M. Sroavastava said (A., 88) Normally police compares

the cases on the basis of *modus operandi* and circumstances. In this series of cases under inquiry, all the cases have the same characteristics.

On the basis of the above evidence on record, the pinpointing of responsibility on persons directly or indirectly involved may reasonably be confined to the then Golaghat police protected Sulfas of Gollaghat and Bagarijeng as directly involved, and on the then Golaghat District Police administration as indirectly involved, partly for the reason that the family of Hiran Deka was frequently visited by the Sarupathar police and his father and even the younger sister were brought to the Srupsthr P.S. for interrogation, and the fact that the Maruti Gypsy used by the assailants was a black coloured one and Golaghat police admittedly had some such Gypsies, but described the vehicle as Maruti Van, in the message circulated to police Stations throughout the State. It was also in evidence that the then D.S.P.(HQ) of Golaghat district was utilised by the then S.P., Golaghat district for anti-ULFA operations including Sarupathar area which gave a sense of urgency throughout the district. The Commission believed the officer when he said that he was not there in this operation, but the sense of urgency permeated throughout the district, and as a result in both the cases of the district the brethren of ULFA members were fatally involved, though the officer seemed to have maintained good relation with the two families.

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such kidnappings/killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(1) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure, which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/ requisition by the State Govt. The Structure itself envisages its review after every three months; and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para 14 of "Part I. INTRODUCTORY," of this report and is referred to in this context. The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under

the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire. first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

. The Army Districts. In para 15 of Part I we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The

power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; ammunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions would amount to violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitions and/or some Ulfa related papers are posthumously put near the dead bodies, obviously for post mortem justification of the killings. This will not stand on the way of the spade being called a spade...

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" Sukracharya's **Dandaniti** is based on *danda*, meaning, punishment. Ancient sages said that without *danda matsyanyaya* will prevail and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these

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rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner..While no training course will be appropriate, considering their exalted position and prestige,periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea..their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters". trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law. .

So far as the Government wings, agencies, and authorities, both official and political, the principle of "responsible superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional, legal, and human rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal matters, the insolvency principle should be followed and the political persons also be given

fair field and no favours in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

This case deserves to be revived and re-investigated.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to be its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning person is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the bread earning youth of the family has been kidnapped and has not been seen or heard of by those who would have heard of him had he been alive under the circumstances discussed in the case. The O.C. deposed that the boy might have been killed and buried somewhere. The D.S.P.(HQ) deposed that sometime after Ulfa ShriMukut Deka, elder brother of Hiran Deka, surrender he came to Shri Mahanta to obtain some writing with a view to search Hiran Deka, as he learnt from some source, was somewhere at Barpeta, but Shri Mukut Deka did not depose anything of the kind in his deposition before this Commission, implying that nothing materialised. Otherwise no evidence is available. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, of the bereaved family. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, including the minor children of the bereaved family. The Commission can, on the basis of evidence arrive at a finding on the death as facts. But the Commission may not be justified in arriving at such a finding without proof of the *corpus delicti*, i.e., that the killing has been done by someone. Such a finding, though it might have been justified if the *corpus delicti* was found, or there is evidence either direct or circumstantial, of the death of the person alleged to have been killed. If the evidence is circumstantial, it must be so cogent and compelling as to convince that upon no other rational hypothesis than being killed the facts could be accounted for. In the absence thereof, the question will be whether a presumption of fact of death could be drawn. Passage of time from his last being seen is one of such circumstances. The time varies from country to country. Since death involves question of rights, the period should be safely decided. To take guidance from English law, W.M. Best on The Principles of the Law of Evidence, 9th ed, p.344. S.409 writes:

hul. "The fact of death may, however, be proved by presumptive as well as by direct evidence. When a person goes abroad, and has not been heard for a long time, the presumption of the continuation of life ceases at the end of seven years from the period when he was last heard of. And the same rule holds generally in respect to persons who are absent from their usual places of resort, and of whom no account and for whom no account can be given. But there is no fixed limit of seven years." This period of seven years is based on English statute. Where question of

property rights are involved, it is reasonable to wait for a period applicable thereto. For example, the Presumption of Life (Scotland) Act, the period is thirteen years. Phipson on Evidence (9th ed. P.701) writes that "in one case the Court refused to presume death from unexplained absence under suspicious circumstances after twenty years." (Re. Lidderdale, 57 S.J. 3) Accordingly, we may wait for twelve years or so, unless otherwise proved earlier. In the instant case, the boy Hiran Deka was last seen near his shop and being taken away by the assailants on 18.8.99. The kidnappers were evidently believed to have been prowling secret killers, who could, therefore, be taken to have caused his disappearance. Shri Monmohan Deka, O.C, Sarupathar P.S. thought that the boy may have been killed. Lastly, this Commission has included this case among the other cases of secret killing. From 18.8.1999 till date, more than six years have elapsed. Considering all the above circumstances, a presumption of the facts of death of the youth, namely, Hiran Deka may not be reasonably drawn; and so it is found. However, the compensation need not wait so long, and should reach his family members as soon as possible. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate Assam, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to Shri Narayan Deka, father of the victim Hiran Deka, a sum of Rs.5,00,000/- (Rupees Five lakhs) only. As a measure of abundant caution, the State may insist on a bond of indemnity, should Hiran Deka be found to be alive. More than six years have already elapsed, and it brooks no farther delay.

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SHRI JATIN PHUKAN AND SHRI NIRMAL KONWAR KILLING CASE

Kakotibari P.S. Case No.25/99

Date of Occurrence -24.8.99

By this Commission's order dated 5.4.2006, by virtue of the authority conferred on it by the Government of Assam's Notification Nos. No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No. No.PLA 331/2005/1 dated 22.8.2995, after hearing the applicant and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry, with notice to the State Government. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case, the following terms of reference, and any other related and relevant matters with recommendations, if any, namely

- "(a) Circumstances, in each case, leading to the killing of its victim(s).
- (b) Identity of the killer(s) and accomplice(s), if any.
- (c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s).
- (d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killing(s)
- (e) To make recommendations to prevent recurrence of such killing(s)
- (f) Any other matter related to or relevant to the purpose of this inquiry;"

P.W. 4 Shri Akan Gogoi of No.1 Borbil village of Mahmora deposed that in their house there was a carrom board and various boys used to come and play carrom there. On the date of occurrence also some boys played carrom and meanwhile about 20/25 armed people, all in civil dress, and some masked with black cloths entered the compound of the house and shouted "catch, catch" (*dhar, dhar*) and the carrom playing boys ran away, and the armed people chased them and fired at them. When the firing ended, the witness learnt that two of the fleeing boys were killed at about 100 lengths (Nals) away from the house. The boys were unarmed and were playing carrom from about 11 A.M. According to the witness, no announcement was made for the boys to surrender or to raise their hands. They were chased and shot dead in the muddy paddyfield. He did not know which man killed whom. These two boys' dead bodies were subsequently identified to be of Shri Jatin Phukan and Shri Nirmal Konwar. Multiple stitched bullet injuries were noticed on the bodies by their respective relatives.

About Shri Jatin Phukan- While Shri Chittaranjan Phukan, elder brother of Jatin Phukan was driving their cattle home from the field, He heard one Sulfa Muhim Barua standing on the village road and announcing that Shri Jatin Phukan and Nirmal Konwar had been killed at No.2 Barbil village of Mahmora Mauza without mentioning when and how.. Hearing so, his uncle Shri Buddha Phukan proceeded to Sepon P.S. where they were told that the dead bodies were not there but were sent to the Sivasagar Civil Hospital, Joysagar, and going there learnt that the post-mortem of Jatin Phukan was completed and that of Nirmal Konwar was also completed and taken delivery by relatives. They saw several wounds on Jatin Phukan's deadbody in stitched condition..Police also accompanied us in police vehicle The police also accompanied to and remained in the cremation till it was over. Dhittaranjan Phukan did not form any idea as to cause of death and of the killer at that time. All villagers of 35/36 houses of the village attended the cremation

About Shri Nirmal Konwar Shri Chandra Kanta Konwar, father of Shri Nirmal Konwar deposed that on 24.8.99 while he was at his Jabalating Konwar Gaon residence he read about the death of his son Nirmal Konwar at 10. A.M. The In-Charge of the Nemuguri outpost came to his house and asked him to go for identification of his son. Arriving at Nemuguri outpost he was told that the **dead body was at Joysagar Civil Hospital** where to he was taken in a police vehicle and he identified the dead body of Nirmal Konwar, whereafter he was asked to come next day, but on his insisting that next day there shall be no place for cremation due to rushing floods, they handed over the dead body which they brought home in a police vehicle to his Jabalating residence where the accompanying police and army men stayed there for half an hour. He learnt that the dead body was first taken to Kakotibari P.S. which refused it, then to Sepon outpost which also refused and then to the Nemuguri outpost. He did not know the type and extent of injuries inflicted on the body.

(B) The identity of the killers, and their accomplices, if any

The killing of Shri Jatin Phukan and Shri Nirmal Konwar was secret to their relatives not only as to time and place of killing, but also as to the identity of the killers and their accomplices. While they were from Sepon, Nemuguri areas, they are claimed to have been killed at Mahmora No. 1 Barbil village. While the evidence is that they were chased, shot at, and killed in a muddy paddyfield, the police claimed it to have been in an encounter. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at

by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. The identity of the killers and their accomplices, if any, has to be on the basis of evidence on record.

The evidence so far has been that residence of Shri Nirmal Konwar was at Jabalating Konwar Gaon at Nemuguri, and that of Shri Jatin Phukan was at Kakilachuk village under Moran P.S. While Nirmal Konwar was a student of science in Gargaon College, Jatin Phukan left studies in school and learnt driving for livelihood. P.W.3 Shri Chittaranjan Phukan said that 2/3 months before the incident Army, police and Sulfas entered their village, brought out some villagers to the field and gave them some beating, and his impression about it was, that was the time when Army Police and Sulfas used to enter the villages in search of Ulfas, and that was the pattern during A.G.P. regime. There was one Ulfia Shri Rabin Kakoti in their village and he surrendered long before the incident. Another Sulfa Muni Barua was killed in the Moran Polo Club incident. Chittaranjan's youngest sister was married to a person in Mahmora No.1 Barbil village and his brother Jatin Phukan used to go there. Chittaranjan did not think that his brother Jatin was an Ulfia and that garbing him as Ulfia he was killed by army, police and Sulfas.

Shri Nirmal Konwar, after failing in Higher Secondary first year in Gargaon College took some company service at Guwahati and saving money for his admission in College. He was also given some money from home for admission. Nirmal used to stay in a mess and used to bring rice and pocket expenses from home. P.W. 2 Shri Chandra Kanta Konwar, father of Nirmal Konwar did not believe his son to have been an Ulfia, but believed that he was interested in continuing further study. He knew that there was one Ulfia in neighbouring Khamun Village Kushal Duari by name and that he had surrendered and since elected as M.L.A. Two other Ulfas from the area, namely, Naresh Gohain of Bakata Khanikar village and Deepak Changmai of Khamun village, also surrendered, much before the incident. Sulfas came to his house and wanted him to bring back his son Nirmal; and that he recognised the Sulfas as, apart from other things, they brandished their fire arms, and that none else could do so in those days. Later also the Sulfas, he said, came but as none except his ailing wife was there, they waited for long time as was clear from the heap of cigarette ends thrown inside the room. As none turned up ultimately they left. Both the times they came at midnight and at about 10 P.M. on some vehicles which they parked a little away and they could not see and could not say how many came. On the first occasion they came, knocked at the door, when door was opened they asked for Nirmal, and being told that he was not at home, they became furious and bringing a fench stick whipped him severely and left with the warning that consequences of failure to bring back Nirmal would not be good for the family. He reported the matter to the president of the Thana Committee without any result. Being asked as to why he did not report to the police station he replied that since Jayanta was there, it would be of no avail rather worse, because Jayanta would come again and torture him with vengeance. Being asked who was that Jayants, the witness replied that Jayants was alias of Kushal Duori. The witness, being asked how his son was killed, replied that he learnt it from news paper of 25.8.99 that his son was killed by police at No. 2 Barbil village of Mahmora Mauza in a field after long chase, but he thought that it must have been by Sulfas as long chase was not done by Police, but by Sulfas, and that the manner mentioned of secret killers. Asked why in his application he mentioned secret killers he replied that the Sulfas were the secret killers (gupta ghatak). He said that no FIR was lodged in this case. The Army or police never came to his house wanting Nirmal. There was no army camp nearby, but sometimes he saw army vehicles moving by the roads. This is significant because, the police did not appear to have been after Nirmal Konwar at all, and so, there could not have been any encounter

with police. Witness Shri Akan Gogoi, (P.W. 4) mentioned all 20/25 persons to have been in civil dress and some of them masked by black cloth. There were 10/12 boys, only 4, including 2 from the family were playing. In those days boys used to run away at the very sight of unknown faces because of secret killer fobia. Akan Gogoi clearly said that first they took the people to be army men, but when they came near he saw that most of them were in civil dress except 4/5 who wore blacks and covered their faces with black cloths...

P.W. 5 Shri Manik Dowara was at his home in No. 1 Barbil village and 1.30/ 2 p.m. on 24.8.95 looking outside from his house he saw 2 boys being chased and fired at by an armed group of persons in the field near Shri Akan Gogoi's house. Coming out of his house, he saw the boys coming towards his house, and apprehending that they might enter his house, he closed the door. After some time when the firing stopped, someone asked me to open the door, when he opened, he was asked to lift one dead body and carry to their vehicle, The dead body was lying in a water drain. the witness lifted it from water and placed it on the field. The other dead body was also in the field about 5 lengths (sixty feet) from his house. The armed persons took the witness to Shri Akan Gogoi's house to find something to carry the dead body to their vehicle. In that house they found one field levelling equipment (moi) and tying to it they carried the dead body to the parked vehicle near News pam L.P. School. Both of them were taken to Kakotibari P.S. with the dead body. The other dead body was carried by Shri Lachit Gogoi and his brother Shri Lakshi Gogoi to the aforesaid parked vehicles and they were also taken with the dead body to Kakotibari P.S. and all the four were taken therefrom to Sonari P.S. and released next day. Asked in cross-examination the witness said:

"When the dead body near our house was being lifted by me, I was asked by those armed people who were chasing them to examine if there was anything in the pockets or something may have dropped in the drain, I found the boy wearing a 'gangi' and a half pant and when I thrust my hand in his pocket I found something like a small radio I was asked by the people to examine the mud beneath if something fell there. I examined and did not find anything." Asked about the vehicles the witness said there were 5/6 vehicles, but when they took the dead bodies there, only two vehicles were there, one was of Kakotibari P.S. and the other a Maruti Gypsy According to the witness while the two boys were running across the muddy field, the armed persons were chasing and firing at them and also shouting "dhar, dhar". He heard firing sounds when he shut his door and it stopped before he was asked to open his door. Police did not ask them any question in this case at any time. Kakotibari police did not tell them of any recovery of arms from the dead bodies.

P.W. 6 Shri Lakhi Gogoi, a day labourer, and was coming home for tiffin, when he was told by some people not to proceed as there were firings. Accordingly he halted and came only when the firing stopped when inmates told him that somebody may have been killed. When he finished his tea 5/6 armed people wearing black dress and tying black cloth across their foreheads, asked him and his brother Lachit Gogoi to accompany them to a dead body lying in the paddy field. They did not find any arms in the hands and pockets of the boy. They found another dead body in the vehicles and met Shri Anil Gogoi, Shri Lakshi Gogoi, Shri Manik Dowarah and Shri Phuleswar Borgohain near the parked vehicles near the village L.P. school All the four persons were taken with the dead bodies to Kakotibari P.S. and kept them in the lock up, next morning they were taken to Sonari P.S. wherefrom they were released next afternoon. However no question was asked to any of them. Asked in cross-examination the witness said that only three out of five spoke in Assamese, the others did not speak. All were holding their arms on shoulders. The witness believed that the armed persons in black could be policemen as they were taken to the Police Station where the O.C. was also there..

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N.W. 1 Shri Vijay Giri Kuligam was the Addl S.P.(HQ) Sibsagar, and he was informed by Police Control about the case wherein two persons were killed in encounter with the police; and he did not visit the place of occurrence of the case. In cross he said the information was that the encounter was between police and ULFA members, but he could not say whether it was undertaken on source information or not. He was not informed before the operation began. He had forgotten the provision of law under which the police undertook the anti-insurgency operations. According to him normally no Magistrates are necessary to be taken with police for carrying on such operations, and in this case the case diary did not show any Magistrate to have been taken. He did not know whether the names of the two persons killed were or were not there in case records, but he was informed that some arms and incriminating documents were recovered from them, but he did not verify them. He was informed that there was firing from both sides, but no policeman was injured they being better qualified escaped unhurt. He could not answer the question whether the two boys killed were ULFAs. He admitted that there was alarming public resentment in Sivasagar against secret killings at the Sivasagar SULFA camp where their leaders Shri Mridul Phukan and Shri Jayanta Hazarika lived in Sivasagar Town..

N.W. 2 Shri Gautam Bora, the then S.D.P.O. Sonari was not aware of any operation until the S.P. Sivasagar informed him that there was an encounter in the Mahmora area and the two deadbodies should not be kept at Kakotibari but should be brought to Sonari and accordingly he proceeded to Kakotibari P.S., met the O.C. and caused the two dead bodies to be brought to Sonari P.S. From this it is clear that the supposed encounter already took place before the S.D.P.O. Sonari received the telephone call from the S.P. Sivasagar, and that the S.D.P.O. Sonari had no contribution to the said encounter and he even did not know where it took place. The S.D.P.O. said that it was directed by the S.P. Sivasagar. The S.D.P.O. clearly said that the names of the two boys killed, namely, Jatin Phukan and Nirmal Konwar were not in the Sonari extremists list. There is no evidence produced to show that the two boys were in ULFA list in any P.S. The S.D.P.O. admitted that he had no positive role to play in the said encounter. It was said that it was a joint operation of Kakotibari and Moranhat police stations. This could not be accepted as Kakotibari O.C. was taken by the S.D.P.O. Sonari to No. 1 Barbil after he was told by the S.P. that the encounter took place already. The S.D.P.O. of course, did not agree to the suggestions that the SULFA leaders, namely Shri Jayanta Hazarika @ Kushal Duori and Shri Mridul Phukan, both from Sivasagar, prompted to take against these two boys and at their instance the S.P. planned the whole operation keeping the S.D.P.O. in dark and the police with the masked people killed the two innocent boys who were playing carrom and started running away being afraid of the chasing armed party and they were brutally murdered by the party, and also with the suggestion that that the police party with the party of Shri Jayanta Hazarika and Shri Mridul Phukan finding no other person throughout the so called operation killed these two boys for no fault of their own at the instance and collaboration with the SULFA leaders. Drawing of such a conclusion is justified on the basis of the evidence of the public witnesses regarding the nature and extent of the role these two leaders were said to have been playing, considered with the official version that the S.P. used to consult these leaders and the fact that there has been no evidence from the police as to how and in whose hands the two boys were killed, the public version being reasonably credible beyond doubt.

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The O.C. Kakotibari P.S. Shri Tusheswar Dutta, receiving source information of some dreaded Ulfas proceeded at 12 noon to Chiloniting village and reached the source Bhadreswar Konwar's house and found that even before their arrival Shri Suresh Kumar Das of Sivasagar Sadar P.S. and Shri Jugal Bora of Moranhat P.S. already arrived there with their parties and carried on operations in some houses. Then the three parties combined and Bhadreswar Konwar

and his daughter Reena told them that three Ulfas seeing their vehicle ran towards No. 1 Batbil village. Then Shri Dutta left his source Shri Bhadreswar Konwar and his daughter Smti Reena Konwar and half of his force near the vehicle and proceeded towards No. 1 Borbil village through muddy waterlogged paddyfields and midway he heard firing sounds presumably in course of operation. Mr. Dutta's description of firing and counter firing is a figment of his imagination as he was not present at the place of firing. This is irreconcilable with that of the S.D.P.O. that the S.P. Sivasagar told him that the encounter already took place and that only after receiving that phone call he proceeded to No. 1 Barbil village and on way he met Kakotibari O.C. who was back already with the two dead bodies. This clearly meant that he had nothing to do with the said encounter firing. The aim having been achieved by others, it was for Shri Dutta to complete the formalities, without seeing what had happened Mr Dutta describes that he arrived at the spot where the two dead bodies were lying near Manik Dowerah's house. He stops short of saying how could he know that those were the dead bodies of the encounter, and saying how the boys happened to come there. Then comes the finding of a revolver and some cartridges near the two dead bodies. This is interesting as it does not say with whom. Evidence shows that the two dead bodies were lying several lengths apart and between the two will mean nothing. It is here that the police version fails miserably. Mr. Dutta also does not describe the condition of that field and how they happened to be there. The formalities of the dead bodies, etc. were left for the O.C. Kakotibari P.S. The next part of the story is the S.P. asking the S.D.P.O. Sonari to bring the two dead bodies to Sonari, and then the itineraries of the deadbodies to Sepon, Nemuguri, Sivasagar Sadar and the Sivasagar Civil hospital at Joysagar. Shri Dutta admitted in cross-examination that the SP did not behave with him and in fact he said that his party had already gone and no details were given when he asked Dutta to proceed and Dutta proceeded to Silanting, whereas the boys were killed in No. 1 Borbil paddyfield. For this part of the operation Shri Dutta is not a witness wherefor we are to rely on the villagers who saw the killing operation. It could be that the S.P.'s party had already killed the boys and Dutta asked to do the formalities. If that be so all Shri Dutta said were post-facto additions. The crucial point is that Shri Dutta was not there when the two boys were chased and gunned down. His evidence begins from post-operation stage only, about which there is no controversy. The S.D.P.O. said that he was directed by S.P to bring the dead bodies to Sonari which order he carried out. He was not confided in the operation.

The question arises as to whether what was seen by the villagers was in accordance with the law. It may appear blasphemous to disbelieve the police, but right to life and liberty is the most precious right guaranteed by the Constitution of India and its violation cannot be countenanced. The question is whether the prescribed law and procedure have been complied with. The O.C. Shri Tusheswar Dutta was not present where and when the two boys were killed. It is clear from the following.

"Q. When did you hear the firing sounds?"

A. I heard the firing sounds when I was about to leave Bhadreswar Konwar's house. I heard 40/50 rounds, may be even more.

"Q. Was the firing interrupted or continuous?"

A. It was continuous. It may be about 15 minutes.

Q. After reaching Borbil village did you go to any specific house or you also started searching one house after another?

A. I also started searching one after another from my end. After searching about 6/7 houses I found the dead bodies near the house of one Shri Manik Dowerah of No. 1 Borbil village.

Q. After searching 6/7 houses when you found the two dead bodies, did you enquire or ascertain as to from which and from where, house or houses, the boys came there?

A. No. I did not enquire."

From the above evidence it is quite clear that the O.C. did not know the head and tail of the happening. The same was the case with the so called recoveries from the dead bodies, as shown in evidence.

"Q. The American factory made revolver No.1112 which you have found in between the dead bodies was with what range ?

A. The effective range is only 50 meters, but it can reach 100 meters.

Q. As compared to that what were the range of rifles the police parties, including your party ?

A. The parties were carrying A.K.47 rifles with effective range of 200 meters.

Q. What was the position of the field where according to you encounter took place?

A. The field was under knee-deep water and there were houses at a distance and with intermittant standing trees."

The O.C. said that the Sivasagar party had taken black panthers which were directly under the S.P. The Moranhat party did not have black panthers. The Kakotibari party had some commandos but they were guarding the sources Bhadreswar Konwar and his daughter Ranee Konwar and did not join the advance party, and finally they were sent back to Kakotibari P.S.

Q. Could you say which party or a panther or a non-panther shot two boys there?

A. I cannot say that.

Q Did you examine any of the black panthers of the other two parties?

A. I do not remember. The C.D. does not contain any such examination record.

Q. Was any of the policemen or commandos of the parties injured?

A, No.

Q. Is it correct that none of the villagers who came near you said that there was an encounter, what they said was only firing?

A. Yes, they mentioned only firing and none mentioned encounter.

Q. I put it to you that from the records, the deposition and what you have stated today there is hardly any material for an encounter and the proposition of there having been encounter deserve examination and scrutiny?.

A. I have no answer" .

N.W. 4 Shri Kushal Duori @ Jayanta Hazarika, S. 8B noticee denied that he was a resourceful person with a number of Sulfa associates as was suggested in cross examination of the S.D.P.O, Sonari, but said that he was having a business of his own. Denying the correctness of the question put to the S.D.P.O. Sonari, in cross examination, namely, "Is it correct that as clear from the records both SULFAs Shri Jayabta Hazarika and Shri Mridul Phukan stayed at Sivsagar town have influenced S.P Sivsagar and make him believe that there are SULFAs in these villages and they also persuaded him to undertake operations in those villages and as a result the S.P. lent his years to them and without intimating him(the S.D.P.O,) and sidetracking him(S,D.P.O.) took the decision to carry on operation and that too by taking personnel from the

h. k.

Sivsagar(Sadar) P.S. or Kakotibari P.S. " he said:" But I say that myself and Shri Mridul Phukan stayed at Sivsagar Town. And I further say that I have not met or influenced S.P. Sivsagar and make him believe that there were ULFAs in the villages of Chiloniting, No. 1 Barbil and Konwar Gaon and nor I have persuaded the S.P. to undertake operations in the aforesaid villages. Since I have not met the S.P. so the question of lending his ears does not arise and therefore the question of sidetracking the N.W. 2(S.D.P.O.), as stated, for carrying out police operation with parties from Sivsagar and Moranhat police stations does not arise."

Replying to the other suggestion, namely, that two SULFA leaders, namely, Shri Kushal Duori and Shri Mridul Phukan, both from Sivsagar prompted to take steps against those two boys and incited the S.P. planned the whole operation keeping others in dark and the police with the masked people killed the two innocent boys who were playing carrom and started running away being afraid of chasing armed party and they were brutally murdered by the party. Mr Duori said:" With regard to this suggestion I state that I never prompted to take any steps against those two boys and as I have not met the S.P. in my life so the planning the whole operation keeping N.W. 2 in dark did not arise and I am not aware of the police with any person wearing masks killed the two innocent boys who were playing carrom and started running away of the chasing of armed party and I am also not aware if the two boys were brutally murdered by the said party" Shri Kushal Duori also said that he never accompanied any police party nor collaborated with any police or the Sulfas He also said that he contested the last Assembly election from the Thowra constituency and the electorate overwhelmingly supported him to win, and that as M;L;A he is now serving them. In cross he expressed that the ULFA question may be solved through unconditional discussion with Govt. and public support. Asked whether after his surrender the army or police did seek his help in the matter of operation against ULFA he said:"Yes, I remember in one occasion there was such a discussion between both police and army seeking our help in the matter of operation against ULFA. From our side we told that the best way surrendered Ulfas by the army and the police was to appoint the Sulfas in the army or in the police so that the whole time services will be available, otherwise it would be risky for the surrenderies because they will be exposed to the risk of the Ulfas thereafter. The army and the police said that our proposal was not practicable." The last question and answer were:.

Q. In connection with the killing cases of Sivsagar the two names, namely, Shri Jayanta Hazarika and Shri Mridul Phukan have been found to have been widely accepted in connection with the cases of SULFA excesses. What according to you could be the reason for this?

A. I also did not clearly know why it could be so perhaps the general people may not know the names of other SULFAs and these two names may have become current from mouth to mouth;"

As against this, we have the evidence of N.W. 3 Shri Tosheswar Dutta. O.C. Kakotibari P.S.

Q. As you say receiving information from secret sources that some dreaded ULFAs were taking shelter in Chiloniting village did you inform S.P., Sivsagar district Sivsagar?

A. Yes. The S.P. generally would not behave with me. He said his party had already gone.

Q. Does it mean before you got the secret source information, the S.P. already received something and already directed the parties to go?

A. Yes.

Q. Is it correct that that the S.P. did not disclose who were detailed to go?

A. Yes, no particulars of the parties were given to me.

The O.C. admitted that there were no ULFAs in Chiloniting village where he conducted house to house search when he heard the firing sound. Had the Sivasagar or Moranhat parties actually committed the killing, there was no reason why they did not complete the formalities, which had to be performed by the O.C. Kakotibari. In fact there is no police evidence of killing of the two boys. This, along with the mention of assailants mostly in civil dress masking their faces with black cloths makes the hypothesis of there having been some Sulfas in the group reasonable beyond doubt. The names of Shri Kushal Duori and Shri Mridul Phukan may perhaps be reasonably considered.

From the modus operandi of the case, namely, chasing of the boys from where in the house they were playing carrom, through the muddy waterlogged paddyfield, by masked men avoiding recognition, without warning them or calling them to surrender, and shooting them dead while they were running for life, and the chasers killing them while running away, showed that it was not a simple police operation, but by some Sulfas who were letting loose a reign of terror since sometime before the incident. This is confirmed by the fact that those who shot the boys dead, did not wait for the post mortem formalities which were, long thereafter, had to be performed by the O.C. Kakotibari P.S. who said that the paddyfield was under knee deep water, yet claimed to have found a pistol and ULFA related documents in between the two dead bodies lying lengths apart. It belongs to the same category of other cases in Sivasagar district. This is indicative of an organised group of secret killers expert in killing by firearms, swords etc., though in this case shooting by sophisticated firearms was there. It was also to be noted that such killings would not be possible unless the police were conniving or even being in league with the police protected killers. The identity of the killers have, therefore, to be reasonably confined to the protected Police-Sulfa nexus of Sivasagar Town and the then Sivasagar District Policer administration including the then O.C., Kakotibari P.S., with their assisters, facilitators and accomplices, almost giving an idea of the State sponsoring the killing of Shri Jatin Phukan and Shri Nirmal Konwar garbing them as ULFAs.

(C) Whether there was conspiracy in targeting Jatin Phukan and Nirmal Konwar and the motive behind such killing.

The questions of conspiracy and motive, in this case, are connected with the question whether there was or was not an encounter killing in this case. There was no mention of an encounter, yet it is claimed that there was encounter in which both the boys were killed. Was it correct?

Encounter vis-a-vis Murder.

In early Norman times (in England) murder and manslaughter were not distinguished. Every homicide was felonious, unless it was justified, or within the limits described above, excusable. Among the Germanic peoples on the continent a distinction had been drawn between an open killing which was emendable (emend - to remove faults or blemishes, perhaps because it partook of the nature of a fair combat) and a secret killing which was not. Cases of secret killing were classed as *morth* and it is from this that our word 'murder' has come. Under the law of William the Conqueror if a Norman was slain and the slayer was not produced, the district (the hundred) had to pay a fine, and the name *mardrum* was given both to the homicide and to the fine in such a case. But in the twentieth century every homicide that was grave, whether secret or not became unemendable, and the term *mardrum* gradually came to be used to describe a homicide of the most heinous kind. But it is in connection with the ancient view that a secret and treacherous killing especially when it was effected by lying in ambush for the victim, was unemendable that, as it would seem, the allegation that the homicide was done with *malice aforethought*, or *malice prepense* had its origin. This development was assisted by the policy of the courts in quite early times of tempering the

severity of the law for a man who, inflamed by the sting of a sudden provocation, had forthwith slain his attacker. (Kenny, Criminal Law, pp 116-117)

"Murder then is the most grave kind of felonious homicide. Its essential elements have never been defined by statute (in England) but it is traditionally said to be, when a person, of sound memory and discretion unlawfully killed any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied"

In England, since murder is a crime at common law *mens rea* is required. In India the Indian Penal Code 1860, the ingredients of murder have been dealt with different sections of Chapter XVI as "Of Offences affecting Life." in sections 299 and 300 and 301, and their punishments in sections 302 to 304.

"S. 299. Culpable homicide. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

S. 300. Murder. Except in cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly.- if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused, or-

3rdly.- If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly.- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse of incurring the risk of causing death or such injury as aforesaid

More than two centuries ago, Blackstone, the best known of the expositors of the English common law, taught that "all homicide is malicious, and of course, amounts to murder, unless justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. Tucked within this greatly capsulized scheme of the common law of homicide is the branch of law, of course as codified in the Indian Penal Code. we are called upon to administer today. No issue of justifiable homicide, within Blackstone's definition is involved in this case. On the other hand, the police version is that the killings were in an encounter between it and the deceased persons. Was it really an encounter or an extra judicial killing that has to be determined. Law will not countenance an act of extra judicial killing, which is a gross violation of the Justice system, the very basis of our Constitution. as it amounts to denial of the victim's fundamental right to live, the civil liberties and the human rights, and violation of the rule of law. It is all the more dangerous if it is done by those whose duty is to protect the lives and liberties of the citizens under the law. We have to see why the police did not try to catch the person alive before shooting him dead, and whether he did so for pleasing his employers or for betterment of his prospects in service.. or it is due to negligence and indiscipline in the Service.. In fact in all the cases where there appeared to be some semblance of an encounter, the Noticee witnesses were asked as to under what provision of law they could kill the Ulf? The reply was "the law of private defence" What exactly is that law has, therefore to be seen. The Indian Penal Code provides: S. 96 Things done in private defence. Nothing is an offence which is done in exercise of the right of private defence.

S.97. The right of private defence of the body and property. Every person has a right, subject to the restrictions contained in section 99, to defend- First, his own body and body of any other person against any offence affecting the human

body;

Secondly, the property whether movable or immovable of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass

S.99. Acts against which there is no right of private defence.-There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by the direction of a public servant. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities..

Extent to which the right may be exercised..

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence..(The two Explanations are not applicable to this case). Thus, the right of private defence arises on the moment of reasonable apprehension of death or grievous hurt and not otherwise. The imminence of the danger, and reasonableness of the apprehension, and the proof thereof have to be considered. Glanville Williams discussing how imminent must be the danger says:

"It is sometimes thought that defence is allowed only against immediately threatened violence. Clearly force may not be used to meet a threat of violence in the future, because it cannot be said that the force is necessary at the present moment. But if there is a present hostile demonstration that violence is about to be used the defender need not wait till his assailant comes within striking distance, or put his finger on the trigger. To this extent the "pre-emptive strike" is lawful. One can imagine a case where the attacker is going off to summon reinforcements and the defender realises that if he does not shoot him now, he will be lost; in such circumstances shooting should be justified" Imminence is implied. It is not reasonable to use force until the occasion arises. Discussing the question whether a mistaken belief would be enough, the author says 'Nearly all the authorities require it to be reasonable. They take the "objective" view that the defendant's honest belief is no defence to the charge if it was unreasonably arrived at.. The right of private defence or self defence has to be exercised reasonably and even circumspectively, particularly when its result is the death of a person. In fact, the right is, in a sense, denied when it results in death of the person against whom it has been exercised. ..

Formidable Problem of Proof. Glanville Williams, in his Textbook of Criminal Law, asks. If two men fight, and one says he was acting in self-defence, is not there a formidable problem of proof? Yes, and, in particular, a person kills in what he conceives to appear to be self defence is subject to the serious risk that the emergency will not appear to the jury in the same light that it appeared to him. When looking back at the incident, the fact likely to make the situation impression that a man has been killed, the transitory fear felt by the accused person has left no memorial to compare with the tragic reality of the corpse. If there is a survivor of the incident on the other side, his account of what has happened is likely to differ essentially from that of the accused. Even impartial spectators are unreliable witnesses to a sudden affray that is over in a few minutes or seconds. When the issue is one of self-defence, everything depends on which side was the aggressor, and the temporal order of events is

therefore of high importance But, experiments indicate that it is difficult to establish by oral evidence. In particular, witnesses have been shown to have been unable to recall words with accuracy. Hence, there arise two dangers in the administration of the law, unjust conviction and unwarranted acquittal after a concocted defence. Of the two risks, the former has to be taken the more seriously, and for this reason the law casts the burden of negating the defence of self-defence upon the prosecution, only the evidential burden being rested on the defendant. If the case is clearly one of self defence, the Judge will not even allow the case to go to the jury."(P. 449)..

In the context of the secret killing cases it would be necessary to ascertain the correct attitudinal/legal approach to the killing of the victim on the part of the armymen/policemen To be precise, seeing one person, whether he was to kill him or to capture him which he could do even by chasing and if required maiming and disabling him. In other words, did the victim already has reached the end to his right to life and liberty, so that he could be killed or shot at sight?.. If the person was already known for certain to have been an Ulfa, could he be shot and killed, and if it was not certain whether he was an Ulfa or not, was it not the killer's duty first to ascertain and then deal with him accordingly? Usually, in this part of the country, what is being seen is that the armymen, and the (militarised) policemen, perhaps for being in the same Unified Command Structure, assume themselves to have been required or authorised to kill the suspected Ulfas/extremists straightway.. Very often some make-belief posthumous evidence is laid near the dead body to show or prove that the victim was an Ulfa or in Ulfa mission. This perhaps shows in what casual manner the human right to life and liberty is often being dealt with/ defrauded by these State agencies personnel.. These questions have to be considered in the prevailing background situations, namely, the state of Assam has been declared a disturbed area under the Assam Disturbed Areas Act/ the Assam and The Armed Forces Special Powers Act, 1958 since extended to the North Eastern States..

This term Conspiracy is replied in two parts. 1.. Conspiracy in targeting, and 2. Motive behind the killing.

I. Conspiracy in Targeting the Victim. Conspiracy in the context of the instant inquiry, will mean criminal conspiracy which is defined in Section 126A of IPC as follows:.

"When two or more persons agree to do or cause to be done-

- (1) An illegal Act, or
- (2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing As defined in Section 107 of the Indian Penal Code (IPC)

"A person abets the doing of a thing, who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explanation -1. A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to

cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

Explanation -2 Whoever either prior to or at the the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act”.

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the killing of Jatin Phukan and Nirmal Konwar has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators? It is in evidence that the family members of Jatin Phukan and Nirmal Konwar were requested by various Govt. agencies to persuade their younger brother shri Nirmal Konwar, who was suspected to have been an ULFA, and were forewarned by the Sulfas, that if Nirmal could not be persuaded, by them to join the peace talks and bring peace, the consequences would not be good for the family. The persons who participated in the act of actual killing on the fateful night, must have been the same or their agents and accomplices and as such, there could be no other answer than that there was criminal conspiracy in the killing of Jatin Phukan and Nirmal Konwar..

There is evidence to show that the SULFAs were enjoying protection from the police. This may have disabled the police from taking the right action against the SULFA in this case. Similar situation was found in case of Nalbari police sheltering SULFAs. Indeed the police- SULFA nexus has been submitted in arguments by the learned counsel for the Commission, the Government, and the parties. This means that the SULFA emerged as an extra-Constitutional authority. In case the SULFA were such a body of persons and were used by police either as an auxiliary, or as the striking arm, they would also be part of the conspiracy. . We have already discussed that as conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In the killing of Jatin Phukan and Nirmal Konwar were 5/6 persons in the act of killing. But there was a course of conduct involving the deciders of the course of action culminating in the killing. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of killing show that there must also have been some authoritative institutional assurance of safety to the killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being among the protectors against the victims they were bound to protect under the law, in this case.

II. Motive behind the killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence that the Sulfas asked the families to produce the boys before them, otherwise the consequences would not be good for them.

Therefore, there could be no doubt that forwarners having been a part of the conspiracy. The then Chief Minister published press appeals to the members of ULFA families to persuade their ULFA members to give up path of violence and surrender, the Army, the CRPF and the police accordingly advised the families, and also forewarned that consequences of failure to do so would not be good for the family and persuaded the members of Jatin Phukan's family in that line. The fact that there was a request made to the literary organizations and Sahitya Sabhas of the State to persuade the ULFAs to surrender is in the deposition of the then Chief Minister Mahanta. A course of conduct by different agencies towards similar persuatuin and the forewarning that in case of failure to effect surrender consequences would not be good for the family of Nirmal Konwar and thereafter finally

culminating in his killing support such a conclusion beyond reasonable doubt..Contemporary similar killings brought in evidence of this case also showed that it was the consistent pattern to follow. One may question why, in face of the constitutional and legal right for every citizen to freedom of thought and belief, freedom of association, the relatives need be pressurized to bring their wards back to peace talks, and why relatives who failed to do so should be mentally tortured and reign of terfror let loose and when even then they failed, they should be secretly killed ? The way in which, and with which Jatin Phukan and Nirmal Konwar have been killed leaves no doubt that the killers enjoyed complete immunity for their acts of killing, The way in which in this case, as in all other Sivasagar cases, the investigations were made to fizzle out and the F.R. (Final Report was submitted, shows that the police has been in collaboration with the killers. All these also prove that the entire scheme is being remote- orchestrated from the top of the department.. Those in helm of the Deparment have to be held accountable and need be brought to justice. The matter being of criminal nature proof must be beyond reasonable doubt. The evidence in series of cases with common characteristics lead to such a conclusion beyond reasonable doubt. .

The immediate motive of the killers could be any reward or satisfaction emanating from those who harboured the ultimate motive and engaged the killers. The desire of a consequence is the motive for an action. Expected promotion or even a better posting may be an immediate motive. The member of the UIFA family has been executed brutally, for no fault of his, and only for his belonging to the suspected ULFA families of Jatiin Phukan ad Nirmal Konwar., that was, for a status offence without any sanction of law and in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. The motive was the perpetuation of the AGP rule in the State of Assam by villainy, treachery and monstrous cruelty and dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material.. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as - a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the killing will mean that for which the killer has committed the killing, and without which he would not have done i On the facts if the case there was conspiracy in the killing of Jatin Phukan and Nirmal Konwar, and that too of the worst kind being among those who were to protect the victims..

(D) Pinpointing responsibility on persons involved directly or indirectly in the killing.

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is forthcoming in such extents as could help us in pinpointing responsibility on the persons involved.

Fortunately the term of reference mentions "involved directly or indirectly in commission of killing" This enables us to act on basis of integrated evidence rather than on isolated ones. We have therefore to integrate such parts of evidence as will lead to a conclusion beyond reasonable doubt, for pinpointing responsibility. Besides what are found in relevant pieces of evidence, the common characteristics found in each individual case also throw some light. We have, of course, to follow the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasonable doubt in this case.

The best evidence rule . "Phipson on Evidence," 9th ed. P. 51 under caption : "The Best Evidence Rule. Strict Proof" Says: "The maxim that "the best evidence must be given of

which the nature of the case permits." has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P. 53) According to Phipson, "In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court".

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of seven cases is therefore is relevant and admissible,

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said:

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e, when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz, as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so.. The foundation of this is the probability or likelihood of that agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation, accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C. Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence.

The following common characteristics of the first group of seven cases and the second group of eight cases are found in this case while answering its terms of reference so

as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely :

1. That this killing involved suspected ULFA families, being those of suspected Ulfas Jatin Phukan and Nirmal Konwar. and its investigation fizzling out, but no clue..

2. Unlike in other cases, this killing, of Jatin Phukan and Nirmal Konwar, was committed in the mid day light..in muddy paddyfield in presence of villagers..

3.. The assailants mostly in civil dress, covered their faces with black wrappers, to avoid being identified.

4. The weapons used in killing were firearms of prohibited bores generally found in police-military situations

5. The firearms being of prohibited bores, forensic examination of the material exhibits was avoided...

6. The vehicles used were reportedly police vehicles which were never seized or taken into custody.

7. There were no police patrolling in the crime areas prior and posterior to, or during the killing.

8. That the army was ubiquitous. There was lurking evidence of Police-SULFA nexus in the killing, some of the latter being constituted into an extra-constitutional authority and used as the executioners,

9. There was general resentment and decry against the Unified Command Structure/ Chief/Home Minister..

10. There was connivance of SULFA; and omission to make any SULFA an accused despite clues..

11. The investigation did not commensurate with the seriousness of the crime perpetrated..

12. That modern scientific methods of investigation, finger/foot prints, dog-squads were never used.

13. No condolence message was sent from the then Govt. of Assam to the victim families..

14. No ex-gratia/compensatory payment was made or offered by the then Govt. of Assam in this case.

15 In this case death penalty has been imposed for "status offences," on Phukan and Nirmal Konwar garbing them as ULFA.s

16. That from evidence of this case, as in all other cases, "remote orchestration" of "Ulfocide" is deducible. These common characteristics, along with evidence, prove, beyond reasonable doubt, remote orchestration of "Ulfocide" from Home Minister, through Police-SULFA nexus using some SULFAs as the striking arms or executioners. ..

On the basis of evidence on record, the responsibility of persons involved directly or indirectly in killing of Shri Jatin Phukan and Shri Nirmal Konwar have, therefore, to be reasonably pinpointed on the then protected Police-Sulfa nexus led by Sulfas Shri Kushal Dnori @ Jayants Hazarika and Shri Mridul Phukan @ Samar Kakoti, of Sivasagar Town, and the then Sivasagar District Police administration, including the then O.C., Kakotibari P.S., and their assistants, facilitators and accomplices, almost giving an idea of State sponsoring the killing of Shri Jatin Phukan and Shri Nirmal Konwar. garbing them as ULFA.s though there was no evidence of their being ULFA members and no proof was

Sub.

produced. There was no encounter but a cool and calculated murder of the two boys. The assailants having been in civil dress and masked, had no right to kill the boys, and the SULFAs had no power to chase or kill the boys. even if they were Ulfas, which, admittedly, they were not.

This case deserves revival and re-investigation.

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(!)The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure. which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/ requisition by the State Govt. The Structure itself envisages its review after every three months,; and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para 14 of "Part I. INTRODUCTORY." of this report and is referred to in this context. The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State.. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire. first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy.. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

The Army Districts. In para 15 we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper

Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; ammunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions

would not countenance violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitions and/or some Ulfa related papers are put near the dead bodies. obviously for post mortem justification of the killings This will not stand on the way of the spade being called a spade...

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" **Sukracharya's Dandaniti is based on danda**, meaning, punishment. Ancient sages said that without *danda matsyanyaya* will prevail and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner.. While no training course will be appropriate, considering their exalted position and prestige, periodical periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea.. their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters", trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law.

So far as the Government wings, agencies, and authorities, both official and political, the principle of "respondeat superior" will surely apply; and for all the lapses and misdeeds at the

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So far as the Government wings, agencies, and authorities, both official and political, the principle of "respondeat superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional and legal rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle should be followed and the political persons also be given fair field and no favour in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any

one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the bread earning youths of the families have been shot dead under the circumstances discussed in the case. The public prosecution may result in punishment of the culprits, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, including the minor children of the bereaved family. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to the parents of each of the two victims, namely, Shri Chitta Ranjan Phukan and Shri Chandra Kanta Konwar, for the benefit of each family, a sum of Rs.5,00,000/- (Rupees five lakhs) only forthwith. More than six years have already elapsed and it brooks no farther delay

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SHRI KESHOB KONWAR KILLING CASE

Golaghat P.S, Case No. 230/99

Date of Occurrence. 1.9.99

By this Commission's order dated 23.8.2006, by virtue of the authority conferred on it by the Government of Assam's Notification Nos. No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No. No.PLA 331/2005/1 dated 22.8.2995, after hearing the applicant and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry, with notice to the State Government. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case, the following terms of reference, and any other related and relevant matters with recommendations, if any, namely:

"(a) Circumstances, in each case, leading to the killing of its victim(s).

(b) Identity of the killer(s) and accomplice(s), if any.

(c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s).

(d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killing(s)

(e) To make recommendations to prevent recurrence of such killing(s)

(f) Any other matter related to or relevant to the purpose of this inquiry;"

(A) Circumstances leading to the killing of Shri Keshab Konwar.

Keshab
On 1.9.99, at about 9.15 P.M. Smti Dipti Konwar, wife of Shri Keshab Konwar heard the sound of a vehicle stopping near their gate and minutes thereafter heard knockings at their door, and speaking in Hindi, "We are coming from the camps, open the door" Initially hesitating, but ultimately Keshob Konwar opened the door, and Dipti followed him holding a

kerosene lamp. They saw two armed civil-dressed youths covering their faces with black cloth standing outside. They spoke in Hindi "Saheb is in the car and you are called there." and dragged him to the Maruti Gypsy even when he was wearing a loongi. As Smti Dipti followed Keshob with a kerosene lamp in hand, Keshob told her that the same group that came earlier with Nabin Gogoi was coming. On 2.9.99 Dipti Konwar was told by Golaghat police that Keshab Konwar's dead body was lying at the Titabar P.S. The I.O. seized three empty cartridges and live ammunition of A.K.47 rifles, one rope and a cloth from the place where the dead body was found. The inquest over the dead body showed 7/8 bullet injuries over the dead body and the post-mortem showed

Stout male body. R. M. present eyes closed, mouth half open.

- (1). Penetrating wound 04 cm on the back, size about 01 cm each. Margins are inverted.
- (2) 04 lacerated wound over the chest, margins are everted diameter about 03 cm each
- (3) 04 penetrating wound over the back
- (4) 04 lacerated wound over the chest with fracture of sternum

In the doctor's opinion the cause of death was shock and hemorrhage as a result of gun shot injuries. Point of entry back and 4 exits on the front.

The place was by the side of the Dhodar Ali near the Kakadonga bridge in Jorha district. Neighbouring villagers, when examined said that that on 1.9.99. at about 10.30 p.m. they heard firing sound coming from that side. The post mortem report said that the death was due to shock and hemorrhage caused by the said ante mortem injuries.

(B) The identity of the killers, and their accomplices, if any

The killing of Keshab Konwar is secret both as to place of killing and as to the identity of the killers and their accomplices if any; The identity of the killers and their accomplices have to be determined on basis of the evidence on record. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. We discussed the meaning of "secret". In para 7 of the Introductory Part I. Identification of the killers has to proceed on the basis of investigation and evidence wherefrom, as submitted by Dr. Y.K. Phukan and Mr. P.K. Musahari, two shortcomings appear from records, namely, that only routine investigation proceeded; modern methods were not used; police dogs were not engaged. to sniff out the culprits; foot or finger prints were not taken. Investigation was perfunctory, as important evidence were not taken promptly or not at all.

that some policemen from Gaurisagar P.S. coming to their house informed them that their

Shri Arup Konwar, younger brother of Shri Keshob Konwar, has been in the ULFA, since November 1989. Shri Keshob Konwar himself had been associated with the Manab Adhikar Sangram Samiti (MASS). In the previous Assembly election not a single vote was cast at the Narajugi polling booth. It seems for this the wrath of the then Prafulla Kumar Mahanta's A.G.P. Govt, somehow, fell on this Konwar family.. Srimati Dipti Konwar, widow of Keshob Konwar, in her Application to this Commission and in her deposition, consistently with her FIR lodged in the case, narrates the plight of the family.. The police and CRPF used to frequent their house in search of Shri Arup Konwar @ Shri Amar Singh. One day when the family was going to sleep after supper, at about 9.15 p.m., a white Maruti vehicle stopped near their gate and alighting two persons came from the front side and some came from the

back side thus surrounding our house, knocked at our door and asked in Hindi to open the door, when so done, they enquired whether Arup came to his house. In June/July 1995 the O.C. of Golaghat Sadar Police Station Shri Chitta Gogoi with some policemen entered their house and enquired about Arup and asked Shri Keshab Konwar to come to the P.S., and when he went, again asked about Arup. In the year 1996 and 1997 one police officer, with badge of two stars, and some army men visited their house and enquired about Arup Konwar.. On 3rd June 1999 the Deputy Suptdt of Police Shri Mugdha Jyoti Mahanta, along with a number of policemen, came to their house bringing with them her husband's nephew Nitul Konwar, brother of Ratul Konwar and my husband's brother Anil Konwar and entered their house. when Keshob Konwar was wearing a ganji and a half pant. The party entered their house and took Keshob to show his small tea garden. They searched the drains there but none was found. Smti Dipti Konwar had a hunch that they thought of killing Keshob there, but did not do so for some reason. Next day they gave a severe beating to Anil Konwar and left him near the white Maruti vehicle and took Nitul Konwar and her husband Keshob Konwar to Golaghat P.S. and detained him there for the night. Next day Smti Dipti Konwar with students of Pulibar Adarsha Vidyalaya and some villagers went to the D.C. who directed them to meet the S.P. and when they asked the S.P. as to why Keshob Konwar and Nitul Konwar were arrested, the S.P. told that it was because in the last Assembly election in the Narajugi polling booth not a single vote was cast because of presence of ULFA, and thereafter they released Nitul Konwar but detained her husband and said that he was already sent to Jorhat P.S. wherefrom he was sent to Jorhat Jail to remain there for 3 months.

On 25.1.99 the D.S.P. Shri Mugdha Jyoti Mahanta came to Keshob Konwar's house along with some C.R.P.F. personnel and at first broke the varendah light and pelted stones on the roof of the house. Then they started knocking and kicking at their door, and as a result of constant kicking the lower part of the door gave way. Thinking the intruders to be dacoits Keshob Konwar shouted dacoits, dacoits, hearing which Shri Mugdha Jyoti Mahanta announced "I am Mahanta, none else" Hearing this Keshob Konwar opened the door and Mahanta and two C.R.P.s entered the house. In presence of Mugdha Jyoti Mahanta one C.R.P. slapped Keshob Konwar on his cheek. On 11.8.99 early in the morning at about 6 a.m. the O.C. Golaghat P.S. Shri Nabin Ch. Gogoi and Addl. S.P. Golaghat Shri Brajenjit Sinha along with C.R.P. F, Jawans came to our house and left after taking tea. On 14.8.99 the O.C. Golaghat P.S. Shri Nabin Ch. Gogoi with three armed youths came to their house with three armed youths and taking Keshob Konwar to his old house and picked up his elder brother Shri Rajani Konwar and made both of them attend the 15th August function whereafter they were allowed to come home.

Finally, on 1.9.99. at about 9.15 P.M. Smti Dipti Konwar heard the sound of a vehicle stopping near their gate and minutes thereafter heard knockings at their door, and speaking in Hindi, "We are coming from the camps, open the door" Immediately it came to the minds of the inmates the advice of the O.C. Nabin Ch. Gogoi that unless you recognise us, do not open the door at night. That is why they did not open the door and said "You come in the morning to meet us" At this the knockers said: "If you do not open the door, we will set it on fire" Consequently Keshob Konwar opened the door, and Dipti followed him holding a kerosene lamp. They saw two armed civil dressed youths covering their faces with black cloth standing outside. They spoke in Hindi "Saheb is in the car and you are called there." and dragged him to the Maruti Gypsy even when he was wearing a loongi. As Smti Dipti followed Keshob with a kerosene lamp in hand, Keshob told her that the same group that came earlier was coming. Therefore Dipti thought that O.C. Nabin Gogoi and his men might have come. Dipti thought that her husband could recognise some of the persons who came to their house on the 14th. Saying so her husband told her not to worry about. Standing on the

Keshob

threshold she watched how he was taken inside the vehicle and saw that the armed people took him inside and sped away.

At twilight dawn Dipti informed the incident in their old house. A neighbourhood boy telephoned to Golaghat enquiring whether Keshob was brought there previously, but was told that no person was brought to Golaghat P.S. at night.

In cross Dipti Konwar said that the three civilians armed youths coming to their house on 13.8.99 came in two vehicles, and when inside the house they did not cover their faces. Her impression was that they were Assamese. She took them to have been from the Thana because whenever Shri Gogoi came those were with him. On 1.9.99 the police party of Nabin Gogoi came in a white Maruti Gypsy. She also said that some Sulfas were sheltered at Bogorijeng and that they had beaten some persons of the area. She did not receive any notice of the F.R (Final Report) in the case...

Smti Minu Konwar, younger sister of Keshob Konwar accompanied Smti Dipti Konwar to the Golaghat Sadar P.S. to lodge the FIR and they were asked to sit in another room where one police Officer Hussain took them to another room and informed that a dead body of a male person wearing a loongi was lying at the Titabar P.S. and they could go there. When the two women suggested that some policeman should accompany them to Titabar Hussain told that the O.C. was otherwise busy and none could accompany them and if they needed they could telephone from there. They proceeded

to Titabar P.S. hiring a taxi and at Titabar finding the dead body of Keshob Konwar, the women asked the police as to why the police had killed the farmer and social worker, the Titabar police said: that it was not done by them, but by the Govt. Minu Konwar deposed that they were aware of the atrocities committed by Army, Police and unidentified persons and the advices of the Army and Police to persuade Arup to surrender. According to Minu Konwar, there was no other reason for killing of Keshob Konwar except for that our younger brother Arup Konwar happened to be an Ulf.

P.W/ 3 Shri Pallab Borbora deposed that both Keshob Konwar and himself were co-workers of the Manab Adhikar Sangram Samity (MASS), and he attended the funeral of Keshob Konwar, and a protest rally against the killing was held and a Memorandum was submitted to the D.C. Golaghat who did not take any steps. Sri Borbora said that the Manab Adhikar Sangram Samity of its own, undertook an enquiry into the killing of Keshob Konwar and could gather that a group of ten to twelve youths since about three months of this incident moving in two white Maruti Gypsies, stationed in a half completed building at Bogorijeng village, move about freely with arms and were creating terror throughout Golaghat. Shri Borbora also deposed that on enquiry they came to the conclusion that the Maruti Gypsy which was waiting near the gate was one of the two such vehicles used by the Sulfas of the Bogorijeng camp and the party included the Sulfas of that camp, and that the other Gypsy must have been waiting a little away out of sight. The witness also said that during that period, while the S.P. was a gentle person, the Dy. Superintendent of police Mugdha Jyoti Mahanta planned such killings throughout and in this case also he was there with the Sulfas from the Bogorijeng camp. He wondered how otherwise the dead body could have been there near the Kakodonga bridge and how the Titabar P.S. could have known about it. He enquired of the Titabar P.S. where an officer told him that Titabar P.S. received a telephone call of some mutual firing at that place and coming there they found the dead body. This according to the witness was absurd as the nearby villages of that place were Tribal and Scheduled caste villages, where on enquiry no telephone was found to have been installed there. From this the witness concluded that the entire plan must have been drawn up and executed by police and executed with the Sulfas of Bogorijeng Sulfas camp. The witness also said that one of the Sulfas of Bogorijeng camp was a limping person who usually operated

from Sibsagar and had some relatives in Golaghat. No doubt these were not direct evidence but their plausibility could perhaps be tested in light of the facts on record. More so in view of increase in such killings.

Asked as to how he viewed the incident, Shri Borbora observed that there were serious incidents of secret killings throughout the State and innumerable persons were killed, the question was when the entire law and order machinery was in operation, there were police, military in the State, how could it be possible for the secret killers to commit the killings with dreadful weapons at different places without the complicity of the law and order protecting machineries and even the State authorities, he asked.

N.W. 1 Shri Brajenjit Singha, was the Addl. S.P.(HQ) Golaghat and he was informed about the case by the then S.P Shri Anil K. Saharia instructing him to escort the dead body home, accordingly he waited at the Pulibar club of which Shri Keshab Konwar was a member, and other members of the club were waiting for arrival of the dead body. aaaaaaahe escorted the dead body and stayed at the cremation till its end. He discussed the case with the I.O. and submitted the first S.R. and the second S.R. He first met Keshab Konwar earlier when he searched his house and while searching an album he found the photograph of the elder sister of one of his friends and on being asked as to how that photograph came there, he was told she was one of their close relatives. Finding no clue the I.O. suggested and the C.I submitted the F.R, and he accepted it. He was at Golaghat in same capacity from 25.5.99 to till first week of August 2001 Police kept watch on the Bogorijeng area and conducted house searches there including that of Keshab Konwar. His impression was that Dipti Konwar did not see the Maruti Gypsy allegedly brought by the killers, Then, according to him, no need of monitoring the activities of Sulfas as those were not objectionable. There was no SULFA camp at Bogorijeng at that time, but the area was sympathetic to the ULFA, hence some house searches were conducted there. He viewed the case from the angles of family quarrel, enmity and also ULFA-SULFA conflict. He disagreed with the suggestion that it was the then Govt's policy to kill Ulfas, the family members and their relatives to pressurise Ulfas to surrender and strengthen the A.G.P. The Titabar supplementary case diary was amalgamated with that of this case. There was no hypothesis, unlike in the other districts of Assam, of the Sulfas being the killers in this case as the prominent Sulfas of Golaghat like Shri Ramesh Saikia, Shri Pradheep Gogoi and Shri Jiten Gogoi were established in business..

N.W. 3. Shri Satyen Patwari On 31.7.99 he assumed charge as Circle Inspector/O.C. of Golaghat Sadar P.S. from Inspector Nabin Gogoi. The incident having been three months old by that time, he submitted a progress report on 5.1.2000 and the Addl S.P (HQ)

N.W. 4. Shri Muktaram Choudhury was the I.O of the case entrusted with investigation by the the O.C., Golaghat Sadar P.S. and he immediately on 3.9.99 itself, with S.I Afique Rahman visited the house of Shri Keshab Konwar, drew a sketch map, and recorded statement of Smti Dipti Konwar, Smti Minu Konwar, and Sarbashri Tarun Konwar, Suren Patra. Nothing could be recovered from the place of occurrence. Afterwards on 18.12.99 he revisited the place of occurrence and collected the supplementary case diary from Titabar P.S. On 31.12.99 he was transferred out. He first knew of the incident at about 2.30 p.m. on 2.9.99 when Smti Dipti Konwar came to Sadar P.S. and stated about kidnapping. The Titabar P.S. telephoned meanwhile that a dead body of Shri Keshab Konwar was lying thereat, but there was no diary entry thereof. Smti Dipti Konwar was directed to go there to see. No policemen accompanied her. as the place was under another P.S. and, unlike in other cases, no order was passed by the O.C. Smti Dipti Konwar told him that the assailants covered their faces with black cloth and spoke in Hindi, and said if they did not open the door, it would be

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set on fire. After recording statements, his impression that the assailants were civilians, but had no idea as to who they were. There was no pressure not to investigate seriously, nor not to investigate at all. The instruction in operations was to capture ULFA except when there was an encounter....

N.W. 5 Shri Sonaram Deka joined the Golaghat Sadar P.S. on 31.12.99 and took over as I.O. of this case, read the case diary, engaged sources, but could find no clue. Final progress report of the case was submitted by Shri Satyen Patwary, Circle Inspector on 5.1.2000 and the Addl S.P.(HQ) Shri B Sinha accepted the suggestion and the case ended in F.R. on 25.2.2000. Sources told the witness that the dispute between ULFA Shri Aru Konwar and his elder brother Keshab Konwar might have resulted in the incident. This was out of records. He did not give any suggestion about Final Report.

N.W 6 Shri Mugdha Jyoti Deb Mahanta was Dy UPTDT OF Police (HQ) at the relevant time. On receipt of the Ejahar Shri Mukta Ram Choudhury on 1.9.99 informed The Dy Suptdt (H.Q. about the killing of Shri Keshab Konwar whereafter he discussed the matter with the then O.C. Golaghat Sadar P.S. who apprised Mahanta of what Smti Dipti Konwar, wife of Keshab Konwar told him. The then Addl S.P., (H.Q.), Golaghat also informed Mahanta that a dead body was lying at Titabar P.S. and he was instructed by the S.P. Golaghat Shri Anil K. Saharia, to proceed to Titabar to escort the dead body to Golaghat and to enquire into the matter which, he said, was not good. The matter was puzzling to Mahanta inasmuch as Smti Dipti Konwar said that the miscreants spoke in Hindi, while his sources said no army was at Golaghat and none likely to come from outside. Mahanta remembered that Shri Keshab Konwar told him about his brother Arup Konwar having quarrelled with him before joining ULFA and that Keshab wanted Arup to frequent his house because of police troubling him. However, Mahanta did not think that for that reason Arup would take such deadly revenge. Shri Mahanta joined the Assam Police service in 1995 as D>S<P> on probation in 1995, and he was posted as D.S.P.(HQ) in Golaghat district, Golaghat as on 18.5.98 and transferred out on 24.12.2001. The duties assigned to him were Law and order and counter-insurgency operations and he was to inform the S.P. before undertaking such operations. He deposed, inter alia, that Regarding what Smti Dipti Konwar said about the incident of lifting and killing of her husband, he said that the then Addl S.P.(HQ) informed him that there was a dead body in Titabar P.S. and he should go and escort it and to enquire how it happened and by whom, it happened. Mahanta remembered. Regarding the incident on 3rd June 1999 and admitted that he went to the house of Keshab Konwar and of taking him to show his small garden, where he found some plastic shades and examining those, but he denied that he intended to kill Keshab Konwar there in the garden. He also admitted that he went to their house on 25.1.99, though he did not remember the date distinctly, with CRPF personnel, and applied some sticks on their tin roof to alarm them to open the door. He did not remember if their verandah light was broken, even if it was broken, it could be by some CRPF person, and not seen or done by himself. Regarding the breaking of the lower part of the door, he remembered that it was weak, but did not remember if it was broken; and himself entered the house, but did not remember to have seen two CRPF persons also entering with him and one of them slapping Keshab Konwar on his cheek, in his presence. He admitted scolding Keshab Konwar for not opening the door so long and telling him that no stones were pelted on his roof. Thereafter, he said, that he was offered tea and they left his house. He did not understand what Smti Dipti Konwar meant by threat (bhabukj) and admitted having told them that if Arup Konwar was sheltered by them in their house, they would have to face legal consequences. Regarding Shri Pallab Barbor's statement about his using two Maruti Gypsies in operations, he admitted that he carried on a number of

anti-insurgency operations in Golaghat, but on very few occasions he used a black Maruti Gypsy which was a Govt, allotted vehicle, and mostly he was using private vehicles. Regarding Shri Barbora's statement that two Maruti Gypsies were used by the SULFA camp of Bogorijeng, he said that Barbora was almost like his brother, and that the SULFA camp of Bogorijeng was set up in 2001. The statement of Smti Dipti Konwar the assailant spoke in Hindi disturbed him because there were no army in Golaghat, except a small camp at Bokakhat for National Highway and VVIP duties at Kaziranga National Park. He also said that normally he would take Assam police in operations and only in vulnerable areas CRPs, because the CRP followed Dogra Regiment formations and there were coordination difficulties. Regarding culprits, he eliminated ULFA and SULFA and Arup Konwar, but was puzzled when pointed out that only Police was left, when he said no police were involved in this incident and someone aggrieved by Arup's actions might have had a hand. It has been the experience in this inquiry that police often finds the ULFA to be the first and last suspects outside records. He did not visit the place where the dead body was found, though he was asked by S.P. to escort the dead body. He did not meet Smti Dipti Konwar after the incident thinking that she might be emotionally upset. He did not have any role to play in investigation of the case. There were three prominent SULFAs in Golaghat, Shri Ramesh Saikia, Shri Pradeep Gogoi and Shri Jiten Gogoi, (now M.L.A.), all owning tea gardens. ULFA-SULFA clash was there as Ramesh Saikia was once fired at by suspected ULFA. He did not suspect any SULFA in this case as they were in business. He never used the guidance or services of any SULFA in his operations. He also performed the normal duties of D.S.P. (HQ) There were more than 600 SULFAs in Golaghat at that time, and none was suspected in this case. He could dominate all of them. Some frustrated SULFAs went back to ULFA. He tried to ascertain who could have brought Arup Konwar @ Amar Sing and was told that there was a girl at Jalukani, Jorhat whom he could locate but learnt that he was already with that girl somewhere in Meghalaya. According to him the investigation of the case was not properly done considering the crime. The Final Report was submitted within less than five months from the incident. Asked what he thought about the statement of Dipti Konwar that on 1.9.99 at about 9.30 P.M. her husband said that the same people who earlier came with Shri N.C. Gogoi, Mahanta said that no police of Golaghat came there that day. .

N.W. 7 Shri Nobin Ch Gogoi was the O.C. of Golaghat Sadar P.S. on 1.9.99, but being sick he was on sick leave for 15 days, including 1.9.99, and thereafter also he was on leave for three months. He had good relations with Shri Keshab Konwar's family and visited the family several times. About a month before the incident, the then S.P. Shri A.K. Saharia told him that in view of the situation prevailing, the ULFA related families should be cautioned and they should be careful not to let anybody in during night hours unless they were well known, and accordingly he cautioned Keshab Konwar's family not to open the door at night unless the caller was known to them. He visited Keshab Konwar's family 3 / 4 times before the incident, and generally he used to take with him people from 16A.P.(IR) Bn (Indian Reserve Battalion) with him there. One day when he visited that family with the Addl; S.P.(HQ) Shri Brajenjit Singha, there were CRP.F with them. One day he visited the family with the then D.S.P.(HQ) Golaghat, they probably took I.R. Bn personnel with them. In all other occasions he used to take 16 I.R. Bn people with him. He did not see the D.S.P.(HQ) himself breaking the varendra light of Keshab Konwar's varendah as alleged by Smti Dipti Konwar, and did not see if some others did so. He admitted that he visited Keshab Konwar's house and Rajen Konwar's houses on 14.8.99 with 5/6 I.R. Bn people who were in uniform and were Assamese people. He also admitted making the two brothers attend the 15th August function with a view to change the mind of their ULFA brother Arup

Konwar seeing them so attending...He could not tell the names of the 16 I.R. Bn persons taken with him to Keshab Konwar's house on 14.8.99 and explained that the system was to requisition the personnel from Battalion, and there was a Platoon Commander who used to change the personnel.; and that a copy of the requisition might be available with the Platoon Commander as also with the P.S. The Requisition would contain the names of the personnel taken. These questions were relevant in view of Smti Dipti Konwar's statement that while about to board the kidnapper's vehicle he told his wife that there was nothing to worry as the same persons who were coming with Shri Nabin Gogoi, O.C. were coming. However when he did not return she was worried. Shri Nabin Gogoi said that on 2.1.99 at about 8.30 A.M. Smti Deepti Konwar came to his quarter and asked him whether Shri Keshab Konwar was brought to the P.S. previous night. He immediately telephoned to P.S. and the negative result was immediately conveyed to Smti Konwar and also advised her to lodge FIR, and when done, as he was on sick leave, the Second Officer received it and registered the case.

Asked why there were no entries between those of 2.9.99 and 18.9.99, the O.C. replied that instructions were given in between, but the I.O. did not make entries. From the evidence of the O.C. who was constantly on leave at the relevant time, his complicity in the incident appears to be unlikely, formal responsibility apart.

N.W. 8 Sayed Asfiquir Rahman 3rd Officer of Golaghat Sadar P.S. the O.C. being on leave that day, was functioning as OC. on 2.9.99 when the FIR was lodged by Smti Dipti Konwar, at about 10.30 A.M., and he made G.D. entry and registered the Case No. 230/99 a u/s/ 356 I.P.C. suspecting someone with business rivalry might have kidnapped Shri Keshab Konwar, and entrusted its investigation to S.I. Mukta Ram Choughurt. and instructed him to detect and intercept the Maruti Gypsy said to have been used by the assailants. The distance between Keshab Konwar's Bagarijeng house and the Golaghat Sadar P.S. was about 7 k.m, Witness did not know Keshab Konwar, but knew his ULFA younger brother Arup Konwar @ Amar Subg, and had raided their old house several times, brought some inmates to P.S. and had to be released as nothing objectionable found. He used to raid wanted ULFA houses now and then with APBN personnel and not with army men, and rarely with CRPF. Shri Mugdha Jyoti Mahanta used to operate in Sarupathar, Borpathar and Merapani areas. and not in Golaghat Town itself. He did not remember to have brought Shri Keshab Konwar to the P.S. before the incident. He did not know how Golaghat Sadar P.S. came to know about the death of Keshab Konwar after he was kidnapped, as he was neither the O.C. nor the I.O. of the case. As far as he remembered, no Golaghat Sadar Police party went out on operation on the night of the incident.

It transpired that what were stated by Smti Dipti Konwar were explained, but not denied by the then D.S.P.(HQ) and the O.C. Golaghat Sadar P.S. in evidence..

On the basis of the evidence, the identity of the killers may reasonably be limited to the 16th I.R. Bn persons who came with Shri Nabin Gogoi then O.C. Golaghat Sadar P.S. and the SULFA leaders of Golaghat and the Bagarijeng SULFA camps as stated in evidence and the Golaghat District Police administration and their assistants, facilitators and collaborators as stated in evidence. Evidently there was pressure to get rid of ULFA at the earliest., though certain witnesses did not admit it..

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(C) Whether there was any conspiracy in targeting Shri Keshab Konwar. and the motive behind such killing.

This term is replied in two parts, namely, 1. Conspiracy in targeting, and 2. Motive behind killing.

I. Conspiracy in Targeting the Victim. Conspiracy in the context of the instant inquiry, will mean criminal conspiracy which is defined in Section 126A of IPC as follows:-

“When two or more persons agree to do or cause to be done-

(1) An illegal Act, or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing. As defined in Section 107 of the Indian Penal Code (IPC)

“A person abets the doing of a thing, who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explanation -1. A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

Explanation -2 Whoever either prior to or at the the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act”.

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the killing of Subarna Rabha has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators? It is in evidence that the family members of Subarna Rabha were requested by various Govt. agencies to persuade their younger brother shri Nirbhoi Rabha, who has been an ULFA, and were forewarned by the army, the CRPF and police that if Keshab Konwar could not be persuaded, by them to join the peace talks and bring peace, the consequences would not be good for the family. The persons who participated in the act of actual killing on the fateful night, must have been the same or their agents and accomplices and as such, there could be no other answer than that there was criminal conspiracy in the killing of Keshab Konwar. There is evidence to show that the SULFAs were enjoying protection from the police. This may have disabled the police from taking the right action against the SULFA in this case. Similar situation was found in case of Nalbari police sheltering SULFAs. Indeed the police- SULFA nexus has been submitted in arguments by the learned counsel for the Commission, the Government, and the parties. This means that the SULFA emerged as an extra-constitutional authority. In case the SULFA were such a body of persons and were used by police either as an auxiliary, or as the striking arm, they would also be part of the conspiracy. We have already discussed that as

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conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In the killing of Keshab Konwar there were 5/6 persons in the act of killing. But there was a course of conduct involving the deciders of the course of action culminating in the killing. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of killing show that there must also have been some authoritative institutional assurance of safety to the killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being among the protectors against the victims they were bound to protect under the law, in this case.

II. Motive behind the killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence of P.W 1 Keshab Konwar's widow Smti Dipti Konwar deposed that there could be no other reason for killing of her husband Keshab Konwar, except for that his brother Shri Arup Konwar was in the ULFA. This statement was not challenged in cross-examination. Therefore, there could be no doubt that forewarners having been a part of the conspiracy. The then Chief Minister published press appeals to the members of ULFA families to persuade their ULFA members to give up path of violence and surrender, the Army, the CRPF and the police accordingly advised the families, and also forewarned that consequences of failure to do so would not be good for the family and persuaded the members of Keshab's family in that line. The fact that there was a request made to the literary organizations and Sahitya Sabhas of the State to persuade the ULFAs to surrender is in the deposition of the then Chief Minister Mahanta. A course of conduct by different agencies towards similar persuasuin and the forewarning that in case of failure to effect surrender consequences would not be good for the family of Keshab Konwar, and thereafter finally culminating in his killing support such a conclusion beyond reasonable doubt. Contemporary similar killings brought in evidence of this case also showed that it was the consistent pattern to follow. One may question why, in face of the constitutional and legal right for every citizen to freedom of thought and belief, freedom of association, the relatives need be pressurized to bring their wards back to peace talks, and why relatives who failed to do so should be mentally tortured and reign of terror let loose and when even then they failed, they should be secretly killed? The way in which, and with which Keshab Konwar has been killed leaves no doubt that the killers enjoyed complete immunity for their acts of killing. The way in which in this case, as in all other Goalpara cases, the investigations were made to fizzle out and the F.R. (Final Report) was submitted shows that the police has been in collaboration with the killers. All these also prove that the entire scheme is being remote-orchestrated from the top of the department. Those in helm of the Departments must be held accountable and need be brought to justice. The matter being of criminal nature proof must be beyond reasonable doubt. The evidence in series of cases with common characteristics lead to such a conclusion beyond reasonable doubt.

The immediate motive of the killers could be any reward or satisfaction emanating from those who harboured the ultimate motive and engaged the killers. The desire of a consequence is the motive for an action. Expected promotion or even a better posting may be an immediate motive. The member of the ULFA family has been executed brutally, for no fault of his, and only for his belonging to the ULFA family of Arup Konwar, that was, for a status offence without any sanction of law and in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. The motive was the perpetuation of the AGP rule in the State of Assam by villainy, treachery and monstrous

cruelty and dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as - a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the killing will mean that for which the killer has committed the killing, and without which he would not have done it. We have to ascertain from the circumstances, anterior, present and posterior to the incident of killing, The anterior circumstances were that Shri Arup Konwar @ Amar SSingh was one of the banned outfit ULFA. There had been constant efforts in Assam to solve the insurgency problem created by ULFA and similar outfits in the region. Use of force attained limited success. Some of the extremists have left the country and have taken shelter in foreign countries. Their whereabouts being not known to the anti-insurgency authorities. One possible way was to request the members of the foreign sheltered leaders of the banned outfits and request them to exercise their relationship influence to give up the path of insurgency and come to the normal stream in the country. None could find any fault in such efforts. That such a move was there in case of Keshab Konwar is evident in this case. However, if undue influence, coercion, or violence is resorted to, that may be illegal, punishable and violative of fundamental and human rights. Yet killings are resorted to as in this case.

This reminds one of the Vaishnavite concept of "Kshatriyaka katila Parasu kare dhari, nikhatriya karila samaste basundhari" (You have cut the Kshatriyas holding the parasu axe and made the entire earth Kshatriyaless.)

(D) Pinpointing responsibility on persons involved directly or indirectly in the killing.

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is forthcoming in such extents as could help us in pinpointing responsibility on the persons involved.

Fortunately the term of reference mentions "involved directly or indirectly in commission of killing" This enables us to act on basis of integrated evidence rather than on isolated ones. We have therefore to integrate such parts of evidence as will lead to a conclusion beyond reasonable doubt, for pinpointing responsibility. Besides what are found in relevant pieces of evidence, the common characteristics found in each individual case also throw some light. We have, of course, to follow the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasonable doubt in this case.

The best evidence rule "Phipson on Evidence," 9th ed. P. 51 under caption : "The Best Evidence Rule. Strict Proof" Says: "The maxim that 'the best evidence must be given of which the nature of the case permits.' has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P. 53) According to Phipson, 'In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court'.

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of seven cases is therefore is relevant and admissible,

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said:

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas ; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e, when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz, as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so.. The foundation of this is the probability or likelihood of that agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation , accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C. Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence.

The following common characteristics of the first group of seven cases and the second group of eight cases are found in this case while answering its terms of reference so as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely :

1. That this killing involved an ULFA family, being that of the ULFA Shri Arup Konwar, and its investigation is allowed to fizzle out...
2. As in other cases, this killing, of Shri Keshab konwar, was committed in the dead of night..
- 3.. The assailants covered their faces with black wrappers and caps, to avoid being identified.
4. The weapons used in killing were firearms of prohibited bores generally found in police-military situations

5. The firearms being of prohibited bores, forensic examination of the material exhibits was avoided ...

6. The vehicle used was reportedly a Maruti Gypsy which was never seized or taken into custody..

7. There were no police patrolling in the crime areas prior and posterior to, nor during the kidnapping.

8. That the army was ubiquitous. There was lurking evidence of Police-SULFA nexus in the killing, some of the latter being constituted into an extra-Constitutional authority and used as the executioners. the *modus operandi* being to visit the family, ask members to persuade its ULFA member to surrender, failing which, to send advance team to locate and survey the house, then to send armed and masked persons to shoot /them dead or take them away and kill them secretly and throw the bodies somewhere.. In this case killing was in the dead of night..

9. There was general resentment and decay against the Unified Command Structure/ Chief Minister..

10. There was connivance of SULFA; and omission to make any SULFA an accused despite clues The district administration did not believe any Sulfa to have been involved, but could not also extricate themselves...

11. The investigation did not commensurate with the seriousness of the crime perpetrated..

12. That modern scientific methods of investigation, finger/foot prints, dog-squads were never used.

13. No condolence message was sent from the then Govt. of Assam to the victim family.

14. No ex-gratia/compensatory payment was made or offered by the then Govt. of Assam. in this case.

15 In this case death penalty has been imposed for "status offences," on Shri Keshab Konwar for being a member of ULFA family of the ULFA Shri Arup Konwar..

16 That in all the cases, including this case of Shri Keshab Konwar, there is remote orchestrated Ulfocide, death penalty having been imposed on the victim for "status offence," of being member of ULFA or ULFA related families.

On the basis of the evidence, the responsibility of persons involved directly may be pinpointed on the 16 (I.R.) Battalion persons and the SULFA leaders of Golaghat and the Bagarijeng SULFA camps who came in the vehicle to the house of Shri Keshab Konwar in the fateful night of 1.9.99; and pinpoint indirectly being involved responsibility, on the Golaghat District Police administration not excluding Shri Nabin Ch. Gogoi, then O.C. Golaghat Sadar P.S. and their abettors, assistants, facilitators and collaborators, as stated in evidence. The Commission is inclined to believe that both Shri Mugdha Jyoti Deb Mahanta and Shri Nabin Ch. Gogoi were in cordial terms with Shri Keshab Ch. Gogoi and his family and their direct complicity is doubted, but the impact of the activities of the administration amounting to pressure to get rid of the ULFA. could not be overlooked.

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(1) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure, which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/ requisition by the State Govt. The Structure itself envisages its review after every three months,; and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para 14 of "Part I. INTRODUCTORY." of this report and is referred to in this context. The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State.. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire, first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy.. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

. The Army Districts. In para 15 we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958

was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

“3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area.”

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; ammunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions would not countenance violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitions and/or some Ulfa related papers are put near the dead bodies. obviously for post mortem justification of the killings This will not stand on the way of the spade being called a spade...

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory

provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" Sukracharya's **Dandaniti is based on danda**, meaning, punishment. Ancient sages said that without *danda matsyanyaya* will prevail and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner..While no training course will be appropriate, considering their exalted position and prestige, periodical periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

 Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea..their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters", trouble-shooters and collaborators

in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law.

So far as the Government wings, agencies, and authorities, both official and political, the principle of "respondeat superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional and legal rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle should be followed and the political persons also be given fair field and no favour in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

This case deserves to be revived and re-investigated.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the bread earning patriarch of the family has been shot dead under the circumstances discussed in the case. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, including the minor children of the bereaved family. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to Smti Dipti Konwar, widow of the victim Shri Keshab Konwar, for the benefit of the family, a sum of Rs 5,00,000/ forthwith. More than six years have elapsed and it brooks no farther delay :-

(23)

SHRI JUGAL PHUKAN KILLING CASE

Kakotibari P.S. Case No. 26/99

Date of Occurrence. 10.9.99

By this Commission's order dated 5.4.2006, by virtue of the authority conferred on it by the Government of Assam's Notification Nos. No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No. No.PLA 331/2005/1 dated 22.8.2005, after hearing the applicant and the learned Senior Counsel for the Commission and the

learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry, with notice to the State Government. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case, the following terms of reference, and any other related and relevant matters with recommendations, if any, namely:

- “(a) Circumstances, in each case, leading to the killing of its victim(s).
- (b) Identity of the killer(s) and accomplice(s), if any.
- (c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s).
- (d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killing(s)
- (e) To make recommendations to prevent recurrence of such killing(s)
- (f) Any other matter related to or relevant to the purpose of this inquiry;”

(A) Circumstances leading to the killing of Shri Jugal Phukan..

As deposed by Jugal Phukan's younger brother Shri Homen Phukan, on 19.9.99 two Mahmora boys came to their Akhoia Gaon house and informed that his elder brother Shri Jugal Phukan was killed somewhere at Mahmora; and that soon thereafter he went to Sepon Outpost of Maranhat, where, the next morning, he was told that the dead body was not with them, and he should enquire at the Sivasagar Sadar P.S., and there he was told that the dead body was in the Sivasagar Civil Hospital at Joysagar for its identification, but there he was told that relatives should come there to receive the dead body. Returning home, he sent his father's sister-in-law and two ladies to Civil Hospital, Joysagar who saw the injuries on the dead body; and the next day his father went to the Hospital to complete the formalities, and when the post-mortem examination was completed the dead body was brought home in a police vehicle, and police in 3 / 4 police vehicles came along, and they stayed at the well-attended cremation till completion. Asked how the death was caused, some policemen said that they brought one dead-body and might return with another..

Shri Tosheswar Dutta who conducted the inquest over Jugal Phukan's dead body said that during inquest he found several bullet injuries over the dead body on the chest, neck, above the kidney, below the right arm pit and on the right elbow, and that he had the impression that the injuries were likely to have been from shooting from the front, but he admitted that he was not sure as to the direction and range of firing, nor could he say whether the shooting could be when the victim was in a standing position. He admitted that the victim would have fallen down after the fatal chest injury itself. He also frankly admitted that he did not see the firing as he arrived at the spot after an hour of the alleged time of firing.

As against the above, the version of P.W.2 Smti Fulamai Gogoi was that Jugal Phukan was her uncle and just arrived and wanted a glass of drinking water of her. Giving the glass of water to Jugal, she entered the bath room when commotion was caused by 20/25 armed men in army, police and civil dress and some covering their faces with black cloth entered her house, and coming out she saw that those people shouted "catch, catch" (Dhar, Dhar), and Jugal Phukan ran out by the back door and was fleeing, pursued by the people with arms, and failing to jump over the boundary fencing raised both of his hands. The chasing people shot him dead then and there. The two witnesses were thoroughly cross-examined by the learned Senior Govt. Advocate; and they withstood it firmly..

(B) The identity of the killers, and their accomplices, if any

Digitized by Dr. Sarojkam Phukan

The killing of Shri Jugal Phukan was secret not as to time and place of killing, but as to the identity of the killers and their accomplices, if any. The identity of the killers and their accomplices have to be determined on basis of the evidence on record. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. We discussed the meaning of "secret". In para 7 of the Introductory Part 1. From investigation and evidence, as submitted by Dr. Y.K. Phukan and Mr. P.K. Musahari, two shortcomings appear namely, that only routine investigation proceeded; modern methods were not used; police dogs were not engaged, to sniff out the culprits; foot or finger prints were not taken. Investigation was perfunctory, as important evidence were not taken promptly or not at all.

While the police claim Jugal Phukan's death to have been in an encounter, there is evidence to show that it was not so. The questions of killers and accomplices have to be ascertained on the basis of evidence. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous.

Shri Niron Gogoi of No. 1 Borbil village of Mahmora was, as deposed by Homen Phukan, a driver by profession, was by relation a nephew of deceased Jugal Phukan. Niron Gogoi told Homen Phukan, that it could be one of those caused by secret killers, he replied that the Army, police and Sulfa used to come to their home, tortured him and his parents and he had to conceal himself. They wanted Jugal's whereabouts inspite of being told that Jugal ceased coming home for some time and they had no contact with him. They also forewarned the members of the family that the consequences of failure to bring him back would not be good for the family. They said that Jugal Phukan was an Ulfa, but they told them that they did not know that. Asked about Sulfas in the area they were told that there were Sulfas at Lakowa namely Mridul Phukan, Muhi Barua, and Rabin Kkakoti. Homen Phukan told the Army, the Police and the Sulfas that it was commonly known that Sulfas were with the Army and the police and whenever they came the Sulfas used to speak in Assamese. Army used to come in Army dress, the police in police dress and the Sulfas in civil dress. Homen clearly said that though he himself concealed, from his parents he learnt that the Sulfas, whenever they came, committed various excesses and once they spoiled the cooked rice throwing trash materials on it, and sometimes they used to show their fury by cutting standing banana plants as if they would cut human beings like that; and they always held deadly firearms in hand. Once Sulfa Mridul Phukan opened his jacket chain and pointing his finger to his chain said "I am Mridul Phukan, Jugal Phukan's consequences will not be good". He used to behave in that manner in several occasions. Narrating what Niran Gogoi told him he said: "Army police and Sulfa came to his house, they chased Jugal Phukan shouting catch him, catch him, kill him, kill him" From such shouts. Homen Phukan was sure that the Army, the Police and the Sulfas killed Jugal Phukan as an Ulfa, but he himself did not believe that Jugal was an Ulfa. Asked whether the killing was by the then Govt. in power, Homen replied that it could not be anything else. O.C. Shri Tusheswar Dutta said that he knew when he was O.C,

Moranhat P.S. during 91/92 that Jugal Phukan was an Ulfa and that he was arrested under TADA, but he admitted that he did not verify that in course of investigation of the case and could not deny that human memory often proved slippery..

Smti Phula Gogoi, wife of Shri Niron Gogoi, deposed that on 10.9.99 she was at her native village home when her uncle Jugal Phukan entered her house and wanted a glass of drinking water and she offered him the same and went to the bath room, and he took his seat. Then she heard a loud firing sound near her gate and coming out to see what had happened, she saw about 25 to 30 people some in Army, some in police and rest in civil dresses, most of them with fire arms, only three being in lathies.. They entered her house and chased Jugal Phukan by the back door and reaching the end of the boundary, he raised his hands and lot of firing followed; and at the same time she saw her husband Niron Gogoi being beaten and dragged towards her house and made him sit in her courtyard and shot at his left foot piercing it and there was profuse bleeding. When she entreated not to beat her husband, she too was beaten on her head by firearm butt. Then someone present told her that her husband was dying of loss of blood and advised her to pour kerosene on the wound which coagulated blood and stopped bleeding. Then despite her entreaties they took her husband to Moranhat P.S., then to Sepon Outpost and then to Sivasagar Sadar P.S. She said that by grace of God his life was saved after prolonged treatment. In cross she said that her uncle Jugal Phukan used to visit her house frequently and even stayed at night. She did not know that he was an Ulfa, but she knew of operations by Army, Police and Sulfas and that they came in search of Ulfas, the Army, police and the Sulfas never came only for their house, but only when they entered each and every house in the village.. They did not know that Jugal Phukan was related to her. She did not see any weapon in his hands. Her husband was interrogated in their presence. The co-villagers were greatly frightened and did not come to their house except her father who came from his half a kilometer away house, and helped her.

Three things in evidence complicate the determination of any encounter, the identity of the killers and their accomplices. Firstly, the identity and composition of the killers, secondly, the duration of the encounter, and thirdly, the mention of a "bomb, said to have been found with the dead body of Jugal Phukan.

N.W. 3 Shri Tusheswar Dutta, O.C. Kakotibari Police Station states that on 10.9.99 at noon when he was at Kakotibari P.S., Shri Gautam Bora, S.D.P.O. Sonari came there and asked him to accompany him to Mahmora Borbil village without disclosing the purpose. On his way only he was told by the S.D.P.O. that he received a direction to go to the Borbil village where an operation was going on and he should block the escape routes of the Ulfas. However, arriving there they found that the operation was already over before half an hour, and the dead body was lying, and on examination he found near it a cloth bag with a 'bomb' in it. He learnt that the operation was carried on by the party from Sivasagar Sadar Police Station led by S.Zaman S.I. with a P.R.C. (Para-military Reserve Constabulary). Undertaking the necessary steps, he (Dutta) prepared a seizure list including that object (bomb) and some objectionable Ulfa documents and thereafter called in four neighbouring villagers and made them sign the seizure list as witnesses. Then he was directed by the S.P. Sibsagar Shri P.K. Lohia to take the dead body to Sepon Outpost of Sibsagar Sadar P.S. where the S.P. himself also came. As the O.C. did not have his own driver, one commando of his party drove the vehicle and the O.C. carefully held the 'bomb' during the distance. Arriving Sepon, the S.P. directed the O.C. to perform the inquest over the dead body; and the S.P. himself took the bomb to Sibsagar. The S.P. directed the O.C. to hand over the dead body at the Sivasagar Police Reserve, so that, it would be safe there. The O.C. accordingly handed over the dead body to Sivasagar Police Reserve and went back to Kakotibari by the direct route via Simaluguri, reached Kakotibari P.S. at about 5 P.M. Facts are stranger than fictions. At about

5.45 P.M. when, at Sivasagar, the S.P. invited some local reporters and an Army Explosive expert, to demonstrate the 'bomb' mechanisms, the bomb exploded at the S.P.'s office chamber killing all present in the room.. Next day at about 9.30 A.M. the Kakotibari O.C. wrote and lodged an FIR of the Borbil operation, registered the Kakotibari P.S, Case No. 26/99. In cross-examination of the O.C. Shri Tosheswar Dutta, the following facts were established by admission. He arrived at the place of occurrence about half an hour after the operation and did not see the operation. Reportedly there was another operation party from Moranhat P.S. of whom there was no mention.. There was no other person present at the supposed place of operation, except the O.C. and the supposed Sivasagar P.R.C. party. After preparing the siezure list, the four villagers were called in by the O.C. Nobody deposed that any bomb was recovered from the dead body. In the FIR written by the O.C. himself (next day) there is no mention of any 'bomb'. On the other hand it was written that a 'Land mine' was found, The O.C. admitted that the Kakotibari P.S. was not given any prior information by any one of the supposed operation parties. No proof of their operation. is extant.

Someone in the case mentioned one 'granade' to have been found with the dead body. None survived to tell the real nature of the object that exploded. No post-explotion evidence has been produced.

There has been no evidence of any encounter between any of the parties, Shri Tusheswar Dutta. O.C. mentioned of the Moranhat party, but no detail of any one of them is on the records. On the other hand the Final Report No. 8/2001 dated 31.19.2000 of FIR No.26/99 dated 11.9.99 records of some explosive substances having been found with the dead body, which were said to have exploded in the office of the S.P. It has also been stated therein that the identity of the boy could not be ascertained. It has, therefore, to be takrn that without knowing the identity of the boy, he could never be said to have been an Ulfa, and the evidence to the contrary has to be rejected.

N. W. I Shri Bijoy Giri Kuligam Addl S.P.(H.Q). received the information of the case rather late, only after the investigation proceeded; and he did not go to the place of occurrence. According to him, the then S.P. Sivasagar Shri P.K Lohia (since deceased) proceeded to the place of occurrence Sivasagar, and as far as Shri Giri remembered, an unexploded bomb was recovered "from where Shri Jugal Phukan was killed in encounter" and it was taken to the S.P.' s office at Sivasagar and while it was being examined in presence of two journalists, one policeman, and one army officer, the bomb exploded in the S.P.' s office, on 10.9.99, the bomb exploded killing all those present in the room, while Shri Kuligam was also getting ready to come there. According to him, no enquiry was held on the encounter death of Jugal Phukan and no report thereof was sent to him by the officer who was supposed to have killed Jugal Phukan in the supposed encounter. He never visited the place of occurrence. He did not remember if any written instruction was issued by him in course of investigation of the case, and also did not remember the contents of his verbal instruction he might have given. There was no record in the C.D. of any progress report having been issued, but the Final Report was given in the case. by the C.I. There was no copy of notice to the complainant in the records of F.R. No 8 of 2001, though such notice was a must. He did not remember if the I/O. informed him that there was no clue in the case, nor did he remember if any investigation problem was brought to him by the I/O/ He saw the things, namely, one ID, 200 metr wire, male-female connector, Flash-gun, bomb, igniting switch, 4 pencil batteries, complete device to explode the IED, only when those were shown by the S.P. in his office chamber at Sivasagar. He explained the faults in maintaining the C.D., namely, that the C.D. was opened only on 10.9.99, next entries were on 12.9.99, 15.8,2001, and 31.10.2001 were to be explained by the I/O only. and emphasised that he performed his duties regularly and never neglected it. He did not agree with the suggestions

that the killing of innocent Jugal Phukan, who just came to his relative Niron Gogoi's house and wanted a glass of water to quench his thirst, garbing him as ULFA, was a deliberate act by police and their collaborators, and to hush it up a fake encounter is shown and articles supposed to have been recovered from the place of occurrence were posthumously placed near the dead body by police, the investigation was hushed up in Final Report.

N.W. 3 Shri Gautam Bora, then S.D.P.O. Sonari, on 9.9.99 at about 7/8 p.m., was informed by Shri P.K. Lohia, S.P. Sivasagar, of a planned major ULFA operation at Mahmora area and asking him to proceed to that area early next morning and be on the Mahmora road to block the escape routes; and next morning with a C.R.P.F. platoon with O.C. Kakotibari he waited detailing for different escape routes. At dawn they heard firing sounds from interior Mahmora side. The O.C. Kakotibari proceeded to the place of the sounds through a village road and arrived earlier than the S.D.P.O. who proceeded by the Mahmora main road, and "saw at a distance they found black panthers mixed with policemen numbering 12/15 and about 4/5 police vehicles at four road crossing. Going to the four road crossing we saw a dead body by the side of the main Mahmora road and the police party with one or two villagers. I also saw the O.C. there. (who came by the village road.) " Almost at the same time the S.D.P.O. heard a VSF call instructing him to proceed back to Sonari as there could be retaliation. No details were discussed with him. In cross he said, inter alia, that the operation was led by S.I. S. Zaman of Sivasagar; that a civilian guide may be taken in operation; he was not entrusted to enquire into the operation; the civilian person he saw was limping; his proceeding to Mahmora with a CRP.F platoon was not a part of the operation, but only for blocking escape routes; he was not told by S.P. the time and place and the party of the operation all those being kept secret from him; the S.P. was not present at the operation; he heard firing sounds like rifle sounds; he did not know who brought the bomb from the place of operation to the four roads crossing on the main Mahmora road; he did not visit the place of occurrence as there was no direction from S.P. he did not see any arm collected near the dead body, his instructions were not recorded in the C.D and he disagreed with the suggestion that he did not take the case seriously and hushed it up. ...

N.W. 3 Shri Tusheswar Dutta, O.C. Kakotibari Police Station states that on 10.9.99 at noon when he was at Kakotibari P.S., Shri Gautam Bora, S.D.P.O. Sonari came there and asked him to accompany him to Mahmora Borbil village without disclosing the purpose. On his way only he was told by the S.D.P.O. that he received a direction to go to the Borbil village where an operation was going on and he should block the escape routes of the Ulfas. However, arriving there they found that the operation was already over before half an hour, and the dead body was lying, and on examination he found near it a cloth bag with a 'bomb' in it. He learnt that the operation was carried on by the party from Sivasagar Sadar Police Station led by S. Zaman S.I. with a P.R.C. (Para-military Reserve Constabulary). Undertaking the necessary steps, he (Dutta) prepared a seizure list including that object (bomb) and some objectionable Ulfa documents and thereafter called in four neighbouring villagers and made them sign the seizure list as witnesses. Then he was directed by the S.P. Sivasagar Shri P.K. Lohia to take the dead body to Sepon Outpost of Sivasagar Sadar P.S. where the S.P. himself also came. As the O.C. did not have his own driver, one commando of his party drove the vehicle and the O.C. carefully held the 'bomb' during the distance. Arriving Sepon, the S.P. directed the O.C. to perform the inquest over the dead body; and the S.P. himself took the bomb to Sivasagar. The S.P. directed the O.C. to hand over the dead body at the Sivasagar Police Reserve, so that, it would be safe there. The O.C. accordingly handed over the dead body to Sivasagar Police Reserve and went back to Kakotibari by the direct route via Simaluguri, reached Kakotibari P.S. at about 5 P.M. Facts are stranger than fictions. At about 5.45 P.M. when, at Sivasagar, the S.P. invited some local reporters and an Army Explosive

expert, to demonstrate the 'bomb' mechanisms, the bomb exploded at the S.P.'s office chamber killing all present in the room.. Next day at about 9.30 A.M. the Kakotibari O.C. wrote and lodged an FIR of the Borbil operation, registered the Kakotibari P.S, Case No. 26/99. In cross-examination of the O.C. Shri Tosheswar Dutta, the following facts were established by admission. He arrived at the place of occurrence about half an hour after the operation and did not see the operation. Reportedly there was another operation party from Moranhat P.S. of whom there was no mention.. There was no other person present at the supposed place of operation, except the O.C. and the supposed Sivasagar P.R.C. party. After preparing the seizure list, the four villagers were called in by the O.C. Nobody deposed that any bomb was recovered from the dead body. In the FIR written by the O.C. himself (next day) there is no mention of any 'bomb'. On the other hand it was written that a 'Land mine' was found, The O.C. admitted that the Kakotibari P.S. was not given any prior information by any one of the supposed operation parties. No proof of their operation. is extant.

Someone in the case mentioned one granade to have been found with the dead body. None survived to tell the real nature of the object that exploded. No post-explotion evidence has been produced.

There has been no evidence of any encounter between any of the parties, Shri Tusheswar Dutta. O.C. mentioned of the Moranhat party but no detail of any one of them is on the records. On the other hand the Final Report No. 8/2001 dated 31.12.2000 of FIR No.26/99 dated 11.9.99 records of some explosive substances having been found with the dead body, which were said to have exploded in the office of the S.P. It has also been stated therein that the identity of the boy could not be ascertained. It has, therefore to be taken that without knowing the identity of the boy, he could never be said to have been an ULFA, and the evidence to the contrary has to be rejected.

Shri Mridul Phukan, as S.8B noticee, in his affidavit dated 11.1.2007 stated that in the evidence of Shri Homen Phukan's answer to Q,15, he was falsely and maliciously implicated on the instigation of some interested party; The Q. No. 15 was:

Q. 15. When the Sulfas entered the house either alone or with the army with the police?

A I was not subjected to any harassment, but from my parents I knew that the Sulfas would carry on all sorts of atrocities and violence, once they entered our house. The Sulfas spoiled our rice being cooked throwing trash materials on it and they hit my mother when she was holding a kerosene lamp to show the door. Sometimes they expressed their fury by cutting the banana plants as if they would cut human bodies like that and the Sulfas were holding deadly fire arms in hand. One Sulfa, namely, Shri Mridul Phukan opened the chain of his jacket and pointing his finger from his chain said: "I am Mridul Phukan, Jugal Phukan's consequences would not be good. He used to behave himself in that manner on several occasions."

From the nature and narration of the answer, it will be reasonable to believe his complicity. None is likely to concoct such a story with vivid details.

Shri Mridul Phukan stated in his affidavit that he has been living a dignified life in society doing many social works. and that he has been registered as a Class I contractor under the O.N.G.C. and the State P.W.D, and has been lawfully engaged in contract work for an honest living, and he has been innocent and has never indulged in unlawful activities as alleged above. Shri Phukan further deposed that he joined ULFA in 1988. received arms training, became a Corporal, and left it in 1992; and that after his surrender he was targeted by ULFA as a result of which he sustained multiple fractures in both of his legs which needed prolonged treatment for 2 years till 1995, and for which he had to shift to Sivasagar Town from his native village Patsaku, and that even now he is unable to walk freely.. He denied that he visited Jugal Phukan's house several times and caused atrocities there as alleged. He

deposed that there were appeals from the Govt. to the ULFAs to surrender and that he had security problem for which he sought security, but the same was provided only after he was attacked and injured by ULFA. According to him, there were many cases of Sulfas being attacked and one Purnananda Gohain was killed by ULFA. Sulfas did not live in any camp. He was reported to have had a SULFA camp in his Sivasagar residence, which he denied. He did not know Shri P.K. Lohia, then S.P., Sivasagar, but he came to see his dead body at Sivasagar after he was killed..Shri Mridul Phukan denied that he had any liaison with police after his surrender He admitted that during Shri Prafulls Kumar Mahanta's regime there were a large number of such killings in Sivasagar district and that the Government dismally failed in providing safety and security to the people of the district..

On the basis of the above evidence, it is considered reasonable to confine the identity of the killers to the illusive Moranhat and the Sivasagar police parties, with Sulfas led by Shri Mridul Phukan,, as perpetrators, and the Kakotibari police party and the then Sivasagar District Police administration and their assisters, facilitators, abettors and collaborators as the accomplices. It is recorded that Shri Mridul Phukan denied his complicity in the incident.

From the modus operandii of the case, namely, killing of the boy from one place at another place and the dead body thrown at still another place, and the nature and position of the injuries, it appears that it belongs to the same category of other cases in Sivasagar district. This is indicative of an organised group of secret killers expert in killing by sword or any other sharp cutting weapon, and shooting by sophisticated firearms, which would not be possible unless the police were conniving or even being in league with the police protected killers. The identity of the killers have, therefore, to be reasonably confined to the protected Police-Sulfa nexus of Sivasagar Town and their accomplices/ facilitators almost giving an idea of State sponsormg. the killing of Jugal Phukan, garbing him as ULFA. Shri Zaman of supposed Sivasagar party did not respond to notice from the Commission.

(C)Whether there was conspiracy in targeting Jugal Phukan and the motive behind such killing.

In the contest of this killing case conspiracy will mean criminal conspiracy as defined in section 126 of the Indian penal Code which require combination of prsons in the criminal act. In that sense there can be no doubt that there was combination of series of persons in the killing of Shri Jugal Phukan, and, therefore it must be held that ther was conspiracy in targeting Shri Jugal Phukan.

The questions of conspiracy and motive, in this case, are connected with the question whether there was or was not an encounter killing in this case This was because of the fact that according to the O.C.Kakatibari P.S. the operation was over before half an hour of his arrival at Barbil village and found the dead body. and did not see who were firing and who shot Jugal Phukan dead there. When he arrived Barbil village,he found the dead body of Jugal Phukan there with a cloth bag near it containing a "bomb".No person was present there. The Kakatibari O.C. then called four persons from the neighbouring village after he prepared the seizure list and obtained their signatures thereon. There is no iota of police evidence as to who or which party shot and killed him and wherefrom the cloth bag containing the the "bomb" came there.. The O.C. Kakotibari said that it was the Sibsagar party that was in operation, but there was no evidence. of anyone from that party handing over the dead body to the Kakatibari party. On the other hasnd the evidence was that the S.P. Sivasagar earlier directed the S.D.P.O. Sonari to proceed to Mahmora Barbil village; and the S.D.P.O. took the O.C. Kakatibari with him to that village without disclosing the purpose, and the O.C. arriving there found the dead body with the cloth bag containing the "bomb". the operation having been over by the time the O.C. arrived that village.with the the S.D.P.O as ordered

by the S.P. to move to that place for blocking the escape routes. The situation leads to the conclusion that the party that killed Jugal Phukan had good reasons for not being recorded in evidence. Might be the illusive Sivasagar police party was with the associated Sulfas as the executioners who had to be illusive to the Kakotibari police party. The S.D.P.O. was only blocking the escape routes. Shri .

Encounter vis-a-vis Murder.

In early Norman times (in England) murder and manslaughter were not distinguished. Every homicide was felonious, unless it was justified, or within the limits described above, excusable. Among the Germanic peoples on the continent a distinction had been drawn between an open killing which was emendable (emend= to remove faults or blemishes, perhaps because it partook of the nature of a fair combat) and a secret killing which was not. Cases of secret killing were classed as *morth* and it is from this that our word 'murder' has come. Under the law of William the Conqueror if a Norman was slain and the slayer was not produced, the district (the hundred) had to pay a fine, and the name *mardrum* was given both to the homicide and to the fine in such a case. But in the twentieth century every homicide that was grave, whether secret or not became unemendable, and the term *mardrum* gradually came to be used to describe a homicide of the most heinous kind. But it is in connection with the ancient view that a secret and treacherous killing especially when it was effected by lying in ambush for the victim, was unemendable that, as it would seem, the allegation that the homicide was done with *malice aforethought*, or *malice prepense* had its origin. This development was assisted by the policy of the courts in quite early times of tempering the severity of the law for a man who, inflamed by the sting of a sudden provocation, had forthwith slain his attacker. (Kenny, Criminal Law, pp 116-117)

"Murder then is the most grave kind of felonious homicide Its essential elements have never been defined by statute (in England) but it is traditionally said to be, when a person, of sound memory and discretion unlawfully killed any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied"

In England, since murder is a crime at common law *mens rea* is required. In India the Indian Penal Code 1860, the ingredients of murder have been dealt with different sections of Chapter XVI as "Of Offences affecting Life." in sections 299 and 300 and 301, and their punishments in sections 302 to 304.

"S. 299. Culpable homicide. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

S. 300. Murder. Except in cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly.- if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused, or-

3rdly.-If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse of incurring the risk of causing death or such injury as aforesaid

The English law excuses a person who has been forced to commit an offence by fear of death or of grievous bodily harm, except in cases of treason or homicide.

S. 96 Things done in private defence. Nothing is an offence which is done in exercise of the right of private defence.

S. 97. The right of private defence of the body and property. Every person has a right, subject to the restrictions contained in section 99, to defend-

First, his own body and body of any other person against any offence affecting the human body;

Secondly, the property whether movable or immovable of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass

S. 99. Acts against which there is no right of private defence.-There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by the direction of a public servant. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities..

Extent to which the right may be exercised..

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.. (The two Explanations are not applicable to this case). Thus, the right of private defence arises on the moment of reasonable apprehension of death or grievous hurt and not otherwise. The imminence of the danger, and reasonableness of the apprehension, and the proof thereof have to be considered. Glanville Williams discussing how imminent must be the danger says:

"It is sometimes thought that defence is allowed only against immediately threatened violence. Clearly force may not be used to meet a threat of violence in the future, because it cannot be said that the force is necessary at the present moment. But if there is a present hostile demonstration that violence is about to be used the defender need not wait till his assailant comes within striking distance, or put his finger on the trigger. To this extent the "pre-emptive strike" is lawful. One can imagine a case where the attacker is going off to summon reinforcements and the defender realises that if he does not shoot him now, he will be lost; in such circumstances shooting should be justified" Imminence is implied. It is not reasonable to use force until the occasion arises. Discussing the question whether a mistaken belief would be enough, the author says 'Nearly all the authorities require it to be reasonable. They take the "objective" view that the defendant's honest belief is no defence to the charge if it was unreasonably arrived at.. The right of private defence or self defence has to be exercised reasonably and even circumspectively, particularly when its result is the death of a person. In fact, the right is, in a sense, denied when it results in death of the person against whom it has been exercised. ...

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Formidable Problem of Proof. Glanville Williams, in his Textbook of Criminal Law, asks. If two men fight, and one says he was acting in self-defence, is not there a formidable problem of proof? Yes, and, in particular, a person kills in what he conceives to appear to be

self defence is subject to the serious risk that the emergency will not appear to the jury in the same light that it appeared to him. When looking back at the incident, the fact likely to make the situation impression that a man has been killed, the transitory fear felt by the accused person has left no memorial to compare with the tragic reality of the corpse. If there is a survivor of the incident on the other side, his account of what has happened is likely to differ essentially from that of the accused. Even impartial spectators are unreliable witnesses to a sudden affray that is over in a few minutes or seconds. When the issue is one of self-defence, everything depends on which side was the aggressor, and the temporal order of events is therefore of high importance. But, experiments indicate that it is difficult to establish by oral evidence. In particular, witnesses have been shown to have been unable to recall words with accuracy. Hence, there arise two dangers in the administration of the law, unjust conviction and unwarranted acquittal after a concocted defence. Of the two risks, the former has to be taken the more seriously, and for this reason the law casts the burden of negating the defence of self-defence upon the prosecution, only the evidential burden being rested on the defendant. If the case is clearly one of self defence, the Judge will not even allow the case to go to the jury." (P. 449)..

In the context of the secret killing cases it would be necessary to ascertain the correct attitudinal/legal approach to the killing of the victim on the part of the army men/policemen/SULFA. To be precise, seeing one person, whether he was to kill him or to capture him which he could do even by chasing and if required maiming and disabling him. In other words, did the victim already has reached the end to his right to life and liberty, so that he could be killed or shot at sight?. If the person was already known for certain to have been an Ulfa, could he be shot and killed, and if it was not certain whether he was an Ulfa or not, was it not the killer's duty first to ascertain and then deal with him accordingly? Usually, in this part of the country, what is being seen is that the army men, and the (militarised) policemen, perhaps for being in the same Unified Command Structure, assume themselves to have been required or authorised to kill the suspected Ulfas/extremists straightway.. Very often some make-belief posthumous evidence is laid near the dead body to show or prove that the victim was an Ulfa or in Ulfa mission. This perhaps shows in what casual manner the human right to life and liberty is often being dealt with/ defrauded by these State agencies personnel.. These questions have to be considered in the prevailing background situations, namely, the state of Assam has been declared a disturbed area under the Assam Disturbed Areas Act/ The Armed Forces Special Powers Act, 1958 since extended to the North Eastern States..

Encounter killing by encounter specialists or extra-judicial killings have been reported frequently and one can say that the act of extra-judicial killing, which is a gross violation of the Justice system, the very basis of our Constitution by denying the fundamental right to life, and liberty, the civil liberties and the human rights. Encounter and extra-judicial killings tend to abound in the State.. More than two centuries ago, Blackstone, the best known of the expositors of the English common law, taught that "all homicide is malicious, and of course, amounts to murder, unless justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. Tucked within this greatly capsulized schema of the common law of homicide is the branch of law we are called upon to administer today. No issue of justifiable homicide, within Blackstone's definition is involved. [n. 35] But Peterson's consistent [p. 1229] position is that as a matter of law. More than two centuries ago, Blackstone, the best known of the expositors of the English common law, taught that "all homicide is malicious, and of course, amounts to murder, unless . justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into

manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. Tucked within this greatly capsulized scheme of the common law of homicide is the branch of law, of course as codified in the Indian Penal Code. we are called upon to administer today. No issue of justifiable homicide, within Blackstone's definition is involved in this case. On the other hand, the police version is that the killings were in an encounter between it and the deceased persons. Was it really an encounter or an extra judicial killing that has to be determined. Law will not countenance an act of extra judicial killing, which is a gross violation of the Justice system, the very basis of our Constitution as it amounts to denial of the victim's fundamental right to live, the civil liberties and the human rights, and violation of the rule of law. It is all the more dangerous if it is done by those whose duty is to protect the lives and liberties of the citizens under the law. We have to see why the police did not try to catch the person alive before shooting him dead, and whether he did so for pleasing his employers or for betterment of his prospects in service.. or it is due to negligence and indiscipline in the Service.. In fact in all the cases where there appeared to be some semblance of an encounter, the Noticee witnesses were asked as to under what provision of law they could kill the Ufa ? The reply was ' the law of private defence " What exactly is that law has, therefore to be seen. The Indian Penal Code provides:

S. 96 Things done in private defence. Nothing is an offence which is done in exercise of the right of private defence.

S.97. The right of private defence of the body and property. Every person has a right, subject to the restrictions contained in section 99, to defend- First, his own body and body of any other person against any offence affecting the human body;

Secondly, the property whether movable or immovable of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass

S.99. Acts against which there is no right of private defence.- There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by the direction of a public servant. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities..

Extent to which the right may be exercised..

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.. (The two Explanations are not applicable to this case). Thus, the right of private defence arises on the moment of reasonable apprehension of death or grievous hurt and not otherwise. The imminence of the danger, and reasonableness of the apprehension, and the proof thereof have to be considered. Glanville Williams discussing how imminent must be the danger says:

 "It is sometimes thought that defence is allowed only against immediately threatened violence. Clearly force may not be used to meet a threat of violence in the future, because it cannot be said that the force is necessary at the present moment. But if there is a present hostile demonstration that violence is about to be used the defender need not wait till his assailant comes within striking distance, or put his finger on the trigger. To this extent the "pre-emptive strike" is lawful. One can imagine a case where the attacker is going off to

summon reinforcements and the defender realises that if he does not shoot him now, he will be lost; in such circumstances shooting should be justified" Imminence is implied. It is not reasonable to use force until the occasion arises. Discussing the question whether a mistaken belief would be enough, the author says 'Nearly all the authorities require it to be reasonable. They take the "objective" view that the defendant's honest belief is no defence. to the charge if it was unreasonably arrived at.. The right of private defence or self defence has to be exercised reasonably and even circumspectively, particularly when its result is the death of a person. In fact, the right is, in a sense, denied when it results in death of the person against whom it has been exercised. ..

This reminds one of the Vaishnavite concept of "Kshatriyaka katila Parasu kare dhari, nikhatriya karila samaste basundhari" (You have cut the Kshatriyas holding the parasu axe and made the entire earth Kshatriyaless."

(D) Pinpointing responsibility on persons involved directly or indirectly in the killing.

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is forthcoming in such the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasonable doubt in this case.

The Best Evidence Rule "Phipson on Evidence," 9th ed. P. 51 under caption : "The Best Evidence Rule. Strict Proof" Says: "The maxim that "the best evidence must be given of which the nature of the case permits." has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P. 53) According to Phipson, "In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of seven cases is therefore is relevant and admissible.

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said:

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas ; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e, when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz,

as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so.. The foundation of this is the probability or likelihood of that agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation, accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C. Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence.

The following common characteristics of the first group of seven cases and the second group of eight cases are found in this case while answering its terms of reference so as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely :

1. That this killing involved a suspected ULFA family, being that of suspected ULFA Shri Jugal Phukan, and its investigation allowed to fizzle up, but no clue..

2. Unlike in other cases, this killing, of Shri Jugal Phukan, was committed in the morning, when villagers were in the paddy field..

3.. The assailants covered their faces with black wrappers, to avoid being identified.

4. The weapon used in killing were firearms of prohibited bores being .32/.38 bores generally found in police-military situations

5. The firearms being of prohibited bores, forensic examination of the material exhibits was avoided. Investigation fizzled out..

6. The vehicles used were never seized or taken into custody.

7. There were no police patrolling in the crime areas prior and posterior to, and during the killing.

8. That the army was ubiquitous. There was lurking evidence of Police-SULFA nexus in the killing, some of the latter being constituted into an extra-Constitutional authority and used as the executioners. the *modus operandi* being to visit the family, ask members to persuade its ULFA member to surrender, failing which, to send advance team to locate and survey the house, then to send armed and masked persons to shoot them dead or take them away and kill them secretly and throw the bodies somewhere.. In this case killing was in the morning hours..

9. There was general resentment and decay against the Unified Command Structure/ Chief Minister and District and local Police Administration..

10. There was connivance of SULFA; and omission to make any SULFA an accused despite definite clues..

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11. The investigation did not commensurate with the seriousness of the crime perpetrated..

12. That modern scientific methods of investigation, finger/foot prints, dog-squads, etc., were never used.

13. No condolence message was sent from the then Govt. of Assam to the victim family.

14. No ex-gratia/compensatory payment was made or offered by the then Govt. of Assam in this case.

15. In this case death penalty has been imposed for "status offences," on Shri Jugal Phukan

for being a member of suspected ULFA family of garbed ULFA Shri Jugal Phukan...

15. That in all the cases, including this case of Jugal Phukan, there is remote orchestration of Ulfocide, death penalty having been imposed on the victims for "status offences," of being garbed by them as member of ULFA or ULFA related family.

16. That from evidence of this case, as in all other cases, "remote orchestration" of "Ulfocide" is deducible. These common characteristics, along with evidence, prove, beyond reasonable doubt, remote orchestration of "Ulfocide" from Home Minister, through Police-SULFA nexus using some SULFAs as the striking arms or executioners. The authority has to be held liable and be dealt with according to law..

This conclusion is based on the facts and the similarities of all the cases in almost all respects, which could not be so, unless there was remote orchestration from the highest authority.. The remote was supposed to have been at the Home Minister's level..

On the basis of evidence on record, the responsibility of persons involved directly or indirectly in killing of Shri Jugal Phukan, has, therefore, to be reasonably pinpointed on the then protected Police-Sulfa nexus led by Sulfas Shri Kushal Duori @ Jayants Hazarika and Shri Mridul Phukan @ Samar Kakoti, of Sivasagar Town, and the then Sivasagar District Police administration, including the then O.C., Kakotibari P.S., and their assistants, facilitators and accomplices, almost giving an idea of State sponsoring the killing of Shri Jugal Phukan, garbing him as ULFA; though there was no evidence of his being ULFA and no proof was produced. There was no encounter but a cool and calculated murder of the boy. The assailants having been in army, police and civil dresses and some masked, with black cloths, had no right to kill the boy, and the concerned SULFAs had no power to chase or kill the boy Jugal Phukan, even if he was an Ulfa, which, admittedly, he was not.

This case deserves to be revived and re-investigated.

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(1) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure, which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/ requisition by the State Govt. The Structure itself envisages its review after every three months, and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para

14 of "Part I. INTRODUCTORY." of this report and is referred to in this context. The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire, first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" Sukracharya's *Dandaniti* is based on *danda*, meaning, punishment. Ancient sages said that without *danda matsyanyaya* will prevail and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction,

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fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner..While no training course will be appropriate, considering their exalted position and prestige, periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea.. their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection. But using their services as "guides, "spotters", trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable in criminal law..

So far as the Government wings, agencies, and authorities, both official and political, the principle of "respondeat superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional, legal and human rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle should be followed and the political persons also be given fair field and no favour in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

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This case deserves to be revived and re-investigated.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the bread earning youth of the family has been shot dead under the circumstances discussed in the case. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors, including the minor children of the bereaved family. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay Shri Keshoram Phukan, the father of the victim, for the benefit of the family, a sum of Rs5,00,000/- (Rupees Five lakhs) only forthwith. More than six years have already elapsed and it brooks no farther delay.

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SHRI UMA KANTA GOGOI & FAMILY KILLING AND BLASTING CASE

Kakotibari P.S. Case No. 27/99

Date of Occurrence . 12.9.99

By this Commission's order dated 5.4.2006, by virtue of the authority conferred on it by the Government of Assam's Notification No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No.PLA 331/2005/1 dated 22.8.2995, after hearing the applicant and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, and in the interest of justice, it has taken up this case for inquiry, with notice to the State Government. By virtue of the aforesaid Notifications the Commission is to inquire into, in each case, the following terms of reference, and any other related and relevant matters with recommendations, if any, namely:

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- “(a) Circumstances, in each case, leading to the killing of its victim(s).
 - (b) Identity of the killer(s) and accomplice(s), if any.

- (c) To find out whether there was any conspiracy in targeting the victim(s) and the motive behind such killing(s).
- (d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killing(s)
- (e) To make recommendations to prevent recurrence of such killing(s)
- (f) Any other matter related to or relevant to the purpose of this inquiry;"

(A) Circumstances leading to the killing of Shri Uma Kanta Gogoi and family of six members.

On 10.9.99 Shri Jugal Phukan was killed, garbing him as an Ulfar, by a group of 20/25 fire-armed persons in army, police and civil dresses, some of them covering their faces with black cloths, chasing and shooting him dead, within the boundary-fenced compound of Shri Niron Gogoi and Smti Phula Gogoi of No.2 Borbil village of Mahmora. In course of torturing by the group, Shri Niron Gogoi's foot was injured by puncturing bullet, and he was taken to Sepon outpost along with the dead body of Jugal Phukan, and an object, supposed to have been a bomb, said to have been found near the dead body of Jugal Phukan. The S.P. Sivasagar also was coming to Sepon. On the way, being asked by Shri Tusheswar Dutta, the then O.C. of Kakotibari P.S., who was escorting the Dead body of Jugal Phukan, Niron Gogoi told the O.C. that Ulfas used to come to Uma Gogoi's house, dine there and go back to their hideout in the jungle. From Sepon, while Niron Gogoi was sent to Moranhat for treatment of his foot, the 'bomb' was taken by the then S.P., Sibsagar, Shri P.K. Lohia. to his Sibsagar office, saying that he would hold a press meet and get it examined by Army experts. O.C. Dutta was directed by the S.P. to safely hand over the dead body to Sivasagar Police Reserve, which the O.C. did, and thereafter straightway he left for Kakotibari P.S. reaching by about 4-45 p.m. The S.P. was said to have called two journalists, an Army expert and two others to the meet. Only destiny knew how the 'bomb' exploded then and there, killing all the six persons in the room including the S.P. Mr. P.K. Lohia.

The state of the minds of those who joined the group that killed Jugal Phukan and brought home the 'Trojan horse' could be well imagined. In the night of 11/12.9.99 when the No.2 Borbil villagers went to bed in awe and wonder, Jugal Gogoi, and Nomal Gogoi, elder and younger brother of Uma Gogoi, respectively, in not far off Nommal Gogoi's house, in the wee hours of 2 to 2.30 a.m. first heard several firing sounds, then the wailing of a woman, and by the time the wailing was no more, the deafening sound of explosion of a bomb towards the direction of their brother Uma Gogoi's house, but at night they could not be sure of its position and also being afraid of coming out at night, waited till twilight dawn and coming out what they saw was:

The thatched bambo main house of Shri Uma Gogoi was completely blown off, and the attached kitchen only was precariously standing. The main bedroom had in it 2/3 skeletons in mutilated conditions, human flesh and limbs lay strewn over the entire compound, lot of human flesh and bones and severed limbs hanging from the foliage and branches of compound trees around. Exactly at the centre of the space where Shri Uma Gogoi's bed was, there appeared a three feet deep pit with 6/7 feet circumference. Many things were in smithereens, three broken radio cabinets, three pairs of dirty shoes, one small broken bulb and a piece of ordinary flexible wire, pieces of cotton and quilt cloths, two 9 mm empty cartridges, 6 Nos of cartridge splinters, some said, two empty bottles of India made foreign liquor, these articles being entered into a seizure list in four groups, A, B C and D.. No mention of utensils, clothes etc. The situation was such that all skeletons, flesh, bones, severed limbs had to be bundled in cloths, put into three "thelas" and pushed to the nearest motorable point of the village road from the house. The post-mortem thereof must have been rather nominal than

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real Some bullet splinters and empty cartridges were found during postmortem lodged in the bodies or limbs.those being added in the seizure list.The entire family of six persons comprising Shri Uma Kanta Gogoi, aged about 60 years,his wife Bihuti @ Bindra Gogoi, their three daughters, namely, Mamoni Gogoi, Mitu Gogoi and Manu Gogoi and their only son Dhiraj Gogoi,then a College student, perished beyond recognition. Only survivor was their eldest daughter who was married away 18 months earlier.According to Jugal Gogoi, his brother Shri Uma Gogoi was a simple agriculturist having no enemies. According to the I.O, Shri Tularam Gogoi, as he was told by the villagers, the three daughters who perished were students of Higher Secondary classes in Moran College and were polite and pretty girls According to Jugal Gogoi the three feet deep pit was caused exactly at the space where Uma Gogoi's bed used to be; and that while Shri Uma Gogoi's house was by the side of the forest, that of Niron Gogoi was inside the forest about one furlong away from that of Uma Gogoi's house...

(B)The identity of the killers, and their accomplices, if any

The killing of Shri Uma Gogoi and members of his family was secret not only as to exact time of killing, but also as to the identity of the killers and their accomplices, if any.The identity of the killers and their accomplices, if any, has to be on the basis of evidence on record..It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who.being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous. The identity of the killers and their accomplices, if any, has to be on the basis of evidence on record.It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who.being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude the perpetrator of the crime. However, often they are used as synonymous..We discussed the meaning of "secret".In para 7 of the Introductory Part I. Identification of the killers has to proceed on the basis of investigation and evidence.wherfrom, as submitted by Dr. Y.K.Phukan and Mr. P.K. Musahari, two shortcomings appear from records, namely, that only routine investigation proceeded;modern methods were not used; police dogs were not engaged. to sniff out the culprits; foot or finger prints were not taken. Investigation was perfunctory, as important evidence were not taken promptly or not at all.

P.W. 1 Shri Indra Borgohain who is a prominent person of the area connected with different socio political organisations deposed that "before this incident the army personnel and poloice and spme other unidentified persons used to visit the Mahmora Konwar Gaon and and created a reign of terror for the entire villagers including the family of Uma Gogoi Few days prior to the incident in Uma Gogoi's family(12.9.99), some unknown persons in civil dress and some in Army dress came to the Mahmora Konwar gaon.. Shri Jugal Gogoi(P.W. 5) deposed that about a month before the incident Uma Gogoi came to him and expressed apprehension, as he said, in that area the Assam Police and the Sulfa used to come always in search of Ulfas, and they might enter any house particularly in the night hours, and that created lot of distress in their minds; and that Jugal Gogoi advised him not to worry as he (Uma Gogoi) had not done anything wrong to anybody, and if something happened he should

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inform the village headman promptly. In evidence this was corroborated by the O.C. Shri Tosheswar Dutta when he also said that the S.P. Sivasagar Shri P.K. Lohia was very friendly with the Sulfa leaders of Sivasagar and he directed anti-ULFA operations in the Mahmora area of his own, without taking the S.D.P.O. Sonari and the O.C. Kakotibari P.S. within whose jurisdiction the area fell. Thus a police-Sulfa nexus appeared to have built up. Admittedly, there prevailed a reign of terror in the area. The Commission is discussing this public matter with an apology as the then S.P. is no more.

Shri Indra Bargohain further deposed that at 11/12 th night as he came out to satisfy call of nature he heard a very very loud sound and about half an hour thereafter he saw three vehicles with their headlights on coming from the No.2 Borbil pam of Konwar Gaon towards Mahmora main road leading to Sonari Town; and that early at dawn a boy from their village (Uma Gogoi and Indra Bargohain belonged to the same village) informed him that Uma Gogoi's house was blasted by a bomb which made a very loud sound. Coming there at about 7 a.m, Shri Borgohain saw human flesh and bone strewn all around and hanging from the foliage and branches of the compound trees, some being devoured by dogs and pigs.

Shri Indra Borgohain deposed:

"No policeman recorded my statement in connection with this incident. I believe that a group of persons or group of youth joined an organisation with very high ambition, but failing there they surrendered and Government taking advantage equipped them with dangerous weapons and let them loose over the people of Konwargaon of Mahmora Mauza and this incident was the result of that arrangement for which the Govt. was believed to be at the helm"

Asked what he understood by "secret killing" Borgohain replied that "when the army and the police killed a man in an encounter, it is not described as secret killing, but the circumstances under which the family members of Uma Gogoi were killed, necessarily resulted in our reporting to the police as a case of secret killing" The witness said that neither Uma Gogoi, nor any member of his family was member of ULFA. Being asked whether he complained before authorities of the atrocities, Borgohain replied "We complained to everybody, even we went to the President of India demanding protection from atrocities". He also told the local A.G.P; MLA Shri Hiranya Konwar that "when the entire people have been put in such a situation, why do you come before the election to take their votes, go back". He said that when army and police visited the houses they asked the inmates to inform police if any Ulfa came to them and, if possible make them surrender. Asked whether they also warned the inmates that the consequences of their failure to do so would not be good, he replied that he did not know that, but the fate meted out to the family of Uma Gogoi was eloquent about that.. He also replied that army and police arrested and detained local Ulfas Debojit Konwar and Umesh Konwar and that Sulfas also did the same, as they became very powerful and armed and used to beat many youths of the village. Asked whether the Sulfas pointed out ULFA families to the army, police and CRPF he replied that it was "wholly correct" The following were asked by counsel to the witness:

"Q..70. In the context of the large number of secret killings that took place during the regime of, Chief Minister and Home Minister of the State, and in view of the above facts that no secret killer or any culprit has been detected, what is your opinion about Shri P.K. Mahanta and his Gpvt?

A. In view of the above facts known to all, the fact that the person who was holding the reign of the Govt. doing nothing and showing total indifference to the problem means he was worst of humanity.

P.W 2 Snti Moni Gogoi, eldest and married daughter of Uma Gogoi, deposed that about a month before the incident she visited the house of her parents who then dissuaded her and her husband from coming to their house saying that the army and the Sulfa frequented their

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village and created panic in the village and anything could happen to their family and that a few days earlier a boy of the village was killed by them. This was indicative of an Army-Sulfa nexus being built up. After the incident she could come to her parent's house only on 13.9.99 and on arrival she saw their house in completely broken condition and was told that some of the building materials were utilised at the cremation of the dead bodies. She saw no policemen there and she was not examined by police. Neither the D.C., nor the S.P. came there and no assistance was received from the Govt. She deposed that her father did not have enemies as he earned his livelihood by agriculture growing different crops and selling those in the market. There was no Ulfa in the family. Asked whether Ulfas used to come to their house she replied that many people used to come to their house and she could not say if some of them were Ulfas. Asked as to what then could be the reason of the incident, she said:

"I believe that after Jugal Phukan was taken away by the Army and the police and he was killed, from our neighbour Niron Gogoi's house and Niron Gogoi was reported to have said that Ulfas used to come to our house now and then, I believe that is why the incident in our family occurred."

The above fact of Shri Niron Gogoi reporting so to O.C. Shri Tusheswar Dutta was corroborated/confirmed by Shri Tusheswar Dutta himself before the Commission.

P.W. 3 Shri Dimbeswar Chetia deposed that he after seeing the condition at the place of occurrence with few other villagers, at between 6 and 7 a.m., went to the Village headman Shri Rubul Satnami who, considering it to be a fit case for police to be informed, went with the witness to the Kakotibari P.S. where an officer told them that the O.C. was not there and they had to wait till the arrival of the O.C. at about 12.30 p.m. and on their reporting the incident to him, the O.C. "had shown inability to come to the place of occurrence due to lack of vehicle he advised us to bring the dead bodies by a thela or other means to the Mahmora main road from which a vehicle could have been arranged. Shri Kusheswar Dutta was the O.C. at that time. Hearing this we came back to place of occurrence at about 1.30." The place of occurrence was about 7 miles from the P.S. Police arrived at about 2.30 p.m. and entered the plinth of the house, which was not done by anyone till then. According to the witness the Army, the police and Sulfas used to visit the houses of the village and committed atrocities and earlier they killed Jugal Phukan who was from Akhoiya village of Patsaku. "I believe that this incident could not have happened unless there were some collaborations between the Army, police, Sulfa and the State Government", the witness said.

P.W. 5 Shri Jugal Gogoi corroborated Dimbeswar Chetia P.W.3 that nobody entered the plinth of the house until police did so arriving at 2.30 p.m. and that even before killing of Jugal Phukan 'the Assam Police and the Sulfa were creating terror in that area of Konwar Gaon including No. 2 Borbil village' and that he remembered the name of Sulfa Shri Mridul Phukan rest being forgotten.. He said that police picked up from the place of occurrence 2 No.s of empty bottles of India made foreign liquor. The family had not received any ex-gratia or compensatory payment from the Government.

On 20th January 2007, Shri S.C. Khound, Advocate moved an application on behalf of Shri Prafulla Kumar Mahanta, the then Chief and Home Minister of Assam, in reply to the Commission's notice dated 8.1.2007 U/S. *B of the Commissions of Inquiry Act 1952 in this case, and submitted that Shri Mahanta has filed a Writ petition before the Hon'ble Gauhati High Court challenging the jurisdiction of this Commission to inquire into a case/matter on the basis of petitions filed by individuals or by organisations, and not referred by Govt. by notification as per provision of Section 3 of that Act. and praying that the Commission may not proceed with this case. After hearing the learned counsel as well as the learned senior counsel for the Commission and the learned Senior Govt. Advocate Assam, this Commission ordered that it was known to all concerned that the Commission has been

constituted by the Govt of Assam under section 3 of the Commissions of Inquiry Act, 1952 by notification No. PLA 331/2995/1 dated 22.8.2005 to inquire into originally 6 cases, However, subsequently the Govt. of Assam by its notification No. PLA 331/2005/2 dated 3rd September 2005 was pleased to order the Commission to inquire into the incidents under similar circumstances which occurred during the period from January 1998 to 2001 and also to inquire into the alleged attempted murder of Ananta Kalita of Hajo. In view of the above position it is not correct for the petitioner to submit that this case falls outside the jurisdiction of the Hon 'ble Commission. Besides, in cases originally notified, Mr. Mahanta had been issued notices u/s. 8B and he was voluntarily appearing before the Commission in respect of those cases and also stated that he wanted the truth to be found out and, therefore, he was co-operating with the Commission. Also in the Goalpara P.S. Case No. 1/99 (Mahesh Nath Killing Case), he complied with those notices and filed affidavits and even sought for opportunity to cross-examine witnesses and the permission was gladly allowed to him. All these facts indicated beyond reasonable doubt that Mr. Mahanta had voluntarily submitted to the jurisdiction of this Commission, not only in respect of the first notified group of cases, but also in the additional cases under the subsequent notification. Indeed in the subsequent notification dated 3.9.2005 there is no mention as to how the cases would come before the Commission, implying thereby that who brings the case before the Commission was immaterial and that the Commission could accept a case falling within the specifications, by receiving Memoranda, or even *suo motu* for inquiry. It is indeed puzzling for this Commission as to why of all persons in the State only Shri P.K. Mahanta has challenged the jurisdiction of the Commission umpteen number of times, though his prayers were rejected as many times as those were made.

N.W. 1 Shri Vijoy Giri Kuligam was the Addl. S.P., Sivasagar district. On 12.9.99 at about 12.30 P.M. he was informed from the Police Control that at No. 2 Borbil village under Kakotibari P.S. a bomb blast occurred and killing some people. He proceeded with his staff immediately to the place of occurrence and arrived there almost at the same time as the S.D.P.O. did. on his instruction. He instructed the S.D.P.O. and the O.C. Kakotibari P.S. to take stock of the situation and prepare records scattered dead bodies and human limbs and other things, which the O.C. did. He noticed that the bomb was blast inside house itself and saw api 2' x 3/4.' The thatch and bambo house was in completely collapsed condition. He also instructed the O.C. to interrogate neighbouring villagers and record their statements whereafter he came back to his Sivasagar office. He was in Sivasagar from May 1999 to 2992. Prior thereto he was D.S.P. of Chief Minister's security group. As Addl S.P (HQ) his duty was crimes and Law and Order. Crimes included insurgency crimes also. He used to lead operations as directed by S.P. He did not remember whether the Unified Command Structure was in operation in Sivasagar district, but later remembered that it was. There was provision for joint police and army operations. and army and the S.P discussed it. He did not remember whether he led any insurgency operation in the Kakotibari P.S. area. or apprehended anyone there. A list of wanted Ulfas was maintained but he did not remember any names. No names of Uma Gogoi or any member of his family was in police records. He remembered the names of Sulfas Jayanta Hazarika and Mridul Phukan, and of no others. These two were provided P.S.O.s, and both resided in Sivasagar Town. He visited the place of occurrence again on the Sraddha ceremony day. He issued only verbal instructions to O.C. and I.O. on investigation of the case. From the nature and extent of the incident his impression was that it might be by some extremist group. He did not get any clue to the incident, but denied the suggestion that he did not take any interest in investigation of the case, did not issue any oral or written instructions and did not try for any clue and to see if it could be the handiwork of any SULFA. At that time Shri P.K. Lohia was the S.P., but he

died in a bomb blast in his office a day before the incident, and after a few days Shri T.P.Singh took over as S.P., Sivasagar. According to the witness there was no any way of linking thw SULFA with the incident. He did not agree with the suggestion that this blasting of Uma Gogoi's family, as in other cases of killings of Sivasagar was caused by police authority- SULFA nexus.

N.W. Shri Gauttam Bora was the S.D.P. O. Sonari He received the information about the incident at about 11.55 A.M the same day through the V.S.F. sent by Kakotibari P.S. when th Kakotibari O.C. was also with him at his Sonari official residence.. Immediately he proceeded to the place of occurrence via Kakotibari P.S. as he did not know the place of occurrence. As the road was not motorable for some distance to the Place. he had to leave the vhhicle at the end of the motorable portion and proceed on foot through the muddy village road and arriving at about 1.P.M. and saw the bamboo and thatch house in completely broken condition , the annexe(kitchen) precariously standing. By that time yj O.C. and th Addl S.P.(HQ) also arrived. They all examined whole compound and lifted some thatch to see if some human limbs were underneath, as the entire compound was strewn with human body parts and limbs, many hanging from the tree foliage and branches. Some villagers said that they heard firing sounds before the blasing sound came, but some others were not sure about the preceding firing sounds. Inside the house they saw a 3' deed and 4' diameter pit . Nobody said to have seen anything near befor the blast as theis happened at dead of night. The Second Officer , Kakotibari P.S. was entrusted to b the I.O. and joined the exercise. The strewn human fleshes , bones, limbs and skeletons were gathered together with a view to bundle and carry to the vehicle parked at he motorable point of the road for post-mortem.steps.; and those could be removed only before it was dark. The S.D.P.O. remembered that at that stage someone, said to have been a V.D.P. Secretary informed the Kakotibari Police Station and were suspected to have been the cul[rits. Hearing that the S.D.P.O that early that morning 5/6 boys crossed the nearby river by country boat The S.D.P.O. said. as there were earlier bomb cases in that area, he wrote the story to the S.P., but did not know thereafter as he was transferred out shortly thereafter. .

The witness was cross-examined on this lead when he replied.Memo No. SNR /G-99110 dated 19.9.99 addressed to the S.P.(DSB) Sivasagar was admitted to be that repost. He (S.D.P.O.) did not know whether the footwears found at the blast house had any bloodstains on those.He did not remember whether the blasted house had electricity connection.He was not given the impression that some unknown faces frequented Uma Gogoi' s house before the incident. There was no other motorable road to the house of Uma Gofoi. He did not inquire whether there was any sign of some other vehicle also having come to Uma Gogoi' s house befre the police vehicles arrivd there. He visited the spot and did not see that it was a crossing ghat and he did not dsee any country boat there. He did not find at the blast house any linking wire or other materials for remote controlled explosion there.Till the date of his transfer he had no idea as to who could have caused the explosion, except a guess that it might be by xtremists. But nothing was ascertained. He did not think that the local, or Sibsagar Sulfas could have had a hand in it. a. He also did not think in the line of what could have been the motive behind the blasting.

N.W. 3 was Shri Tosesar Dutta then O.C.Kakotibari P.S was, in fact, with the S.D.P.O. when the latter received the information from the P.S. and with th S.D.P (Civil) he came to Kakotibari P.S. and with him proceeded to the Place of occurrence.received the ejahar of Shri Jugal Gpgoi, (time not mentioned) on 12.9.99, made G.D. entry, registered the case and entrusted its investigation to the Second Officer Shri Tularam Gogoi and they proceeded to the place of occurrence when the Addl S.P..(H.Q) , the S.D.P.O. Sinari and the I.O. were also

there and taking stock of the situation, helped in gathering the strewn human skeletons, limbs, bones and flesh pieces from the compound, also plucking from the branches and foliage of the trees around. He also found a 3' deep crater inside the house. The human remains were bundled in cloths and transported in 3 Thelas, to the place where the vehicles were parked on the village road. It was about 5 P.M. that the remains could be taken to Kakotibari P.A. and next morning those were sent to the Joysagar Civil Hospital for post-mortem examination. Meanwhile at No.2 Borbil village, no outside vehicles were allowed entry and a permanent rifle camp was set up there for patrolling and protection. By that time his transfer order arrived.

In cross The O.C. said, inter alia, that there was specific verbal order for raids and operations in the Mahmora No. 2 Borbil, Siloniting, Mahmora Konwar, Borbil Nos 1 and 2 villages all under Kakotibari P.S. and considered to be ULFA prone due to some incidents earlier, since about 3 months prior to the incident, the order was of the S.P. Shri P.K. Lohia. The operations were a daily affair, no ULFA could be apprehended, some boys were brought to P.S. and had to be released as those were not ULFAs; there were no army attached to Kakotibari P.S., but they used to come from Sivasagar and Sonari camps as ordered by the S.P.; Army did not operate of their own, but always with the police and CRPF; the operations were planned by the S.P. and when army came the police had to go with them as that was taken to be the order of the S.P., the experience of operating with the army was not good; the CRPF was with S.D.P.O. Sonari;

The following statements on operations may be instructive..

"Q Did the army, CRPF, Police and the PRC(Police Reserve Constabulary) jointly undertake the operations?.

A. Yes, the army never operated of their own.

Q. Was it a fact that the army used to be sent by the S.P., Sivasagar to your P.S. and the army took your help for carrying on operations?

A. Yes, it was so. When the army came and asked us accompany them, we accompanied them because it amounted to S.P.'s order.

Q. Is it correct that all operations undertaken by you were directed by the S.P., Sivasagar?

A. Yes.

Q. Does it also mean you even did not know where the operation was to be undertaken with decision given by the army to you?

A. Yes.

Q. From your experience of operating with the army, can you say whether the army often indulged in excesses in the name of undertaking operations?

A. Yes. The army people used to enter every house recklessly and sometimes they used to make indecent approaches towards women.

Q. When you go to operation do you go to a specific target or for general combing operation?

A. When we are out on a specific source information, we go direct to the target, but otherwise we carry on combing operation including persons who are criminals, dacoits suspected ULFAs and even eve teasers.

Q. When the army is sent by the S.P. and you accompany the army, who decides the target?

A. In such cases the army decides the target and generally surrounds a much larger area than the target and ask me to contact the people taking army men with me

Q. When the army comes with you for operation do they have the shoot at sight power?

A. No. They do not have that power the order is to capture alive.

Q. When the inmates of a house refuse to open the door at your or army's command what do you do?

A. We break open the door and enter into the house to capture ULFAs, if any.

Q. If you find suspected ULFAs who are fleeing away what do you do?

A. We have to call upon him to surrender or we have to shout at him that he should surrender and even then he continues to run away then also we have to pursue him, but we have no power to fire at him. However, in very rare cases if we are sure that the fleeing person is surely an ULFA then we may shoot at him to disable him from fleeing, but not to kill him, and such shooting is generally below the knee.

Q. On 12.9.99 did you have any source information of some ULFA having concealed themselves or having taken shelter in No. 2 Borbil village where Uma Gogoi's house was located?

A. No. We did not have any such information.

The above questions were put by Shri P.K. Mushahari, learned Senior Govt. Advocate, Assam, who was ably assisting the Commission, and the answers were from a very senior and experienced O.C. of Kakotibari P.S., and the Commission believes that there is no *suppresio vary or suggestio falsi* in it. What has been stated as to the police powers under the circumstances *prima facie* appear to be in conformity with the law and also Military instructions. But the question is, was this meticulously followed in all operations?

To ascertain pre-incident and post Jugal Phukan killing (10.9.99) situation, it was asked:

“Q. Did you have specific information that ULFAs used to come to No. 2 Borbil village and take meals in Uma Gogoi's house and go back?

A. Yes. We had that information

Q. Did you keep any watch or surveillance over the house of Uma Gogoi after your source informed of the ULFAs having come and dined there?

A. We did not have regular source, but it was Niron Gogoi who was taken with us to Sepon and who was treated for his foot injury, during the journey he told me that ULFAs used to come and dine, among others, in Uma Gogoi's house and that was the first occasion of my knowing this in respect of Uma Gogoi's house”

According to the witness there were neither ULFAs nor SULFAs in Borbil village. There was no item that could be related to any IED in the seizure list. The shoes found were gent's shoes and were found in dirty condition inside the blown up house. This completely negated the hypothesis of those having belonged to any outside visitors. The O.C. thought that the bombing could have been by ULFA, and he thought that the 5 boys who crossed the Disang river early morning could have been the culprits. The witness was then asked:

Q. P.W. 1 Shri Indra Borgohain deposed: " I was going out to satisfy call of nature, when I heard very very loud sound ; about half an hour thereafter , I saw three vehicles with their headlights on, going from the No. 2 Borbil pam of Konwargaon towards Mahmora main road leading towards Sonari Town." Is it not a fact that these vehicles were used by the SULFAs and they were going towards Sonari after causing the explotion?.

A. Nobody told me that.

Q. Did some of the persons you examined tell you that after the sound of explosion they heard the sounds of some vehicles going away?

A. Yes. I was told that.

Q. From your own xperience of having been transferred out of Bokata P.S. within two months of your joining there after you, in performance of your duty conducted a search in Jayanta Hazarikka' s house, did you not think that the S.P. took the decision of your transfer on the report of the SULFA member and thereafter The S.P. bypassed you in official matters and planned and directed operations on basis of their report?

A. I agree.

Q. Don't you think that at that time a nexus built up between the SULFA leadership and the police head of the district and the entire series of operations and police actions were mainly based on and influenced by that nexus' decisions?

A. Yes, I agree in so far as that period was concerned.

Q. On the basis of the above nexus , does it not prove that the act of killing of Uma Gogoi and members of his family and piling up bodies there and putting up the bodies on the bed and the bomb explosion the consequences of which are in evidenced from the records of the case?

A. I cannot say."

From the cross-examined by Shri Nakibur Zaman, Advocate for the petitioner the following information were available. The distance between the compound of the house wherein Jugal Phukan was killed and the house of UMa Gogoi would be about 500 yards only. Jugal Phukan was killed at about 5.00 A.M on 10.9.99 and the tragic bomb explotion that killed the then S,P at his Sivasagar office at about 4.45-5 P.M. same day. The bomb explotion at Uma Gogoi' s house was at about 2.30 A.M. on 12.9.99. From 24.8.99 when Jatin Phukan and Nirmal Konwar were killed to '1.9.99 when Uma Gogoi and his family were killed, the situation at No. 2 Borbil and neighbouring villages was very tense. There was no patrolling in Borbil area in the night between 11/12.9.99. On 12.9.99 O.C, Kakotibari left for Sonari at about 7.30 A.M. and S.I. Shri B. Dutta was in charge. Shri Dimbeswar Chetia and Shri Rubul Satnami stated to have arrived at Kakotibari P.S. at 7.00 A.M. on 12.9.99 to lodge the FIR and were told to wait saying that the O.C. was not there. The O.C. received the information of the incident at Sonari when with the S.D.P.O. The O.C. returned to P.S. and proceeded to P.O. at about 12.45 P.M. with the S.D.O. and reached by 1.15 P.M. (Witnesses said 2.30 P.M.). The distance between the P.S. and the Uma gogoi' s house was about 7 K.M.s There was army round the clock patrolling in the area from 13.9.99. Shri Jayanta Hazarika and Mridul Phukan were not examined in this case. The witness did not agree with the suggestion that " .this incident was caused by your police and that is why you did not arrange patrol party that night and you delayed the investigation of this case in

such a way that no prompt action was taken on the basis of necessity considering the nature and seriousness of the case."

N.W. 4 Shri Tolaram Gogoi was the I.O in the case entrusted at about 12.30 P.M. on 12/9/99 whereafter he proceeded to the P.O and helped in collecting the skeletons, the severed limbs and other mortal remains strewn over the compound and hanging from the branches and foliage of trees around. With the Addl S.P.(HQ), the S.D.P.O., Sonari and the O.C he recovered and seized the following from the P.O., namely, 2 No.s of 7 mm empty cartridges, 4 No.s of 9 mm empty cartridges, splinters, 1 pair power shoes, (ash colour) No. 7, 1 pair Action shoes white colour N. 6 One pair of black Bata boot, No. 9, 4 Nos of broken radio cabinet, 1 small broken bulb connected with yellow colour plastic wire, all seizure listed; and the mortal remains bundles were transported in three thelas to the nearest motorable point of the village road where the vehicles were parked, and by the vehicles to Kakotibari P.S, inquest completed, and therefrom next morning sent to Jousagar Civil Hospital for post-mortem examination. Some persons present at the P.O were examined u/s. 161 Cr.P.C. Next morning with army, Battalion personnel and police he went to the P.O, took stock of the situation, drew a sketch map and examined 2/3 villagers, and thereafter he continued investigation till he was transferred therefrom He joined Kakotibari P.S. from middle of 1999 to 2001. He enquired about the son Shri Dhiraj Gogoi and was told by the people that he was a normal well behaved boy and was student of Patsaku College and was not connected with ULFA organisation. On enquiry he was told that the three daughters were also well behaved and two of them were reading in the Higher Secondary Class in Moran College. He did not enquire whether Mamoni Gogoi was connected with some women's organisation. He learnt that Uma Gogoi recently shifted to this new place and so he had thatch-bamboo new house. Some of the people he examined told him that after the loud sound, they heard the sounds of some vehicles going away from the P.O, but could not give the particulars thereof as they did not see the vehicles. He did not remember whether two empty India made foreign liquor bottles were also recovered from the P.O. The dog squad was not used as the idea did not occur to him and no senior officers so instructed. During his stay there the seized exhibits were not sent for forensic examination. The note written by him that the incident could be caused by ULFA was on basis of source information and on no other basis. No supervisory note was written by higher officers. The note at p.134 dated 7.5.2001 mentioning six names as Ulfas were also on basis of source information and none else. He heard the names of SULFA leaders Jayanta Hazarika and Mridul Phukan, but had not talked to them. He did not see any record of the Kakotibari P.S. case No.27/99 having been made S.R. He did not have the idea of some Sulfas being involved in the case and there was no such instruction from above. He denied the suggestion that the investigation of the case was directed from the high quarters who wanted to safeguard their SULFA collaborators. No person was called to P.S. for interrogation in course of investigation. He denied the suggestion that the incident was caused by Police and SULFA.

N.W. 5 Shri Mridul Phukan @ Samar Kakoti received notice under s.8B with the depositions P.W. 1 Shri Indra Borgohain and P.W. 4 Shri Jugal Gogoi P.W. 5. Shri Mridul Phukan said that he did not know anything about the incident in Uma Gogoi's family in No. 2 Chengelimora on 12.9.99, so also about the atrocities mentioned by Jugal Gogoi, P.W. 5, namely, that after death of Jugal Phukan the police and some Sulfas were creating terror in No. 2 Borbil village and Konwargaon under Mahmora Mauza, he (Mridul Phukan) among the Sulfas was not correct; and that he was not present there and his name was unnecessarily dragged into it, and that he did not know Shri Jugal Phukan and Shri Indra Borgohain who stated that a group of persons or youths joined the Ulfa organisation with high ambition

failing which they surrendered and the State Govt. taking advantage of the situation armed those persons/youths with deadly weapons and let them loose on No. 2 Borbil and Chengelimora villages of Mahmora Mauza and he also included Mridul Phukan's name in the group, and creating reign of terror in the aforesaid villages, though he did not know of any such activities. Shri Mridul Phukan joined the ULFA after passing the Higher Secondary Examination, in 1988 and attained the rank of Corporal in its army wing and surrendered in 1992. He was attacked by ULFA in 1993 causing multiple fracture to both of his legs and it took 2 years outside the State treatment to be cured. He is a registered First Class contractor both under the State P.W.D and the ONGC and has been engaged in business. His original residence was Patsaku, but since 1998 he has been in his Pioli Nagar residence in Sibsagar Town. He has been provided P.S.O.s since after he was attacked by ULFA in 1993. His relationship with Shri Kushal Duori @ Jayanta Hazarika is cordial. He did not know Late lamented S.P. P.K. Lohia. He considered what had happened to Uma Gogoi and his family to have been sad, but did not know its after effects. Asked whether the army and police had some influence over the Sulfas into helping them in their anti-insurgency functions, he said that in so far as he himself was concerned there was nothing of the kind, but he did not know about others. He admitted that when he joined ULFA in 1988 it was with high ideal of Sovereign Assam, and that he was trained with wooden models. He denied that some Sulfas stayed in a camp in his Sivasagar house and said that he resided in his house. He admitted that the situation in Sivasagar District from 1998 to 2001 was very bad there having been a large number of secret killings there, and the then Government of Shri Prafulla Kumar Mahanta miserably failed to protect the people...

Considering the above evidence, there is no doubt that the information given by Shri Niron Gogoi, perhaps not envisaging its ramifications, on 10.9.99, to the O.C. Kakotibari P.S. on way to Sepon that ULFAs used to come to Shri Uma Gogoi's house, dine there and go back to their hideouts, enraged the police and the Sulfas of Sibsagar who were collaborating with the police administration of the district and guiding the professed anti-insurgency operations in the Mahmora area, and that added fuel to the fire that was kindled in the hearts of those SULFAs and the District police administration, having lost the life of the then S.P. Shri P.K. Lohia due to the tragic death of the S.P. Sibsagar the previous evening (10.9.99). What was revealed by Shri Hiron Gogoi to the O.C. Kakotibari was new and startling to the police and the concerned Sulfas and not to the ULFA or the 5/6 river crossing boys. The hypothesis of ULFA bombing the family out of existence could not be believed because the modus operandi is more akin to that of Police-Sulfa nexus than to that of ULFA, and ULFA could be looser rather gainer by killing Uma Gogoi's family. The Commission considered it unreasonable to rely on the alternative hypothesis, introduced by the V.D.P Secretary that the 5/6 boys who were seen crossing the Desang river by country boat early in the morning of 12/9.99 on the grounds, (i) The Police itself did not rely on it as it said the case was clueless till end. (ii) Police did not find any "Parghat or any country boat there, (iii) Police itself did not follow up the hypothesis by ascertaining whereto those boys could have ultimately gone, and lastly, the atmosphere in that area was very tense after the two killings of Jatin Phukan and Nirmal Phukan in one case and of Jugal Phukan on 10.9.99, it was not likely for such simple youths without any arms or conveyance of their own to have caused the blasting. On the other hand, the object found by the side of the dead body of Jugal Phukan was described as a 'bomb, as a land mine and as a grenade by different police officers was reasonably suspected to have been posthumously placed near the dead body of Jugal Phukan and the O.C. arrived near it admittedly after half an hour of the so called encounter having been ended and none was present nearby. If that was so, the source of that 'bomb' must have been the

police-SULFA nexus. If that was possible, same way it could be possible for the nexus to bring the bomb for Uma Gogoi's doom a day later. The evidence shows that the Mahmora operations were guided by some Sulfa element, and the S.P. did the planning under such guidance sidetracking and keeping in dark the two of his concerned, namely, the S.D.P.O. Sonari and the O.C. Kakotibari P.S., both of whom appeared to be otherwise competent officers. Wherefrom the bomb could come was not difficult to the police administration, the army and even the SULFAs could have the bomb. P.W.1 said that at about 2.30 A.M. when he was out for satisfying himself, he saw some vehicles going from Mahmora side towards Sonari within about half an hour from the loud bursting sound was heard. That left no doubt that the bomb that bursted killing all the six inmates tearing them to smithereens was carried by the killers and their accomplices in retaliation to what happened at Sivasagar previous evening. Therefore out of the two, this hypothesis appeared to be more logical and natural and hence preferred as reliable beyond reasonable doubt.

On the basis of evidence on record, the identification of the killers of Shri Uma Gogoi's family may be reasonably confined to the then protected Police-Sulfa nexus led by Sulfas Shri Kushal Duori @ Jayants Hazarika and Shri Mridul Phukan @ Samar Kakoti, of Sivasagar Town, and the then Sivasagar District Police administration, including the then O.C., Kakotibari P.S., and their assistants, facilitators and accomplices, almost giving an idea of State sponsoring the killing of Shri Uma Gogoi's family, garbing them as ULFA; though there was no evidence of their being Ulfas and no proof was produced. That was a cool and calculated murder of the whole family. The killers, including the concerned Sulfas had no power or right to kill the members of the family, garbing them as Ulfas, nay, not even if they were Ulfas, which, admittedly, they were not.

(C) Whether there was any conspiracy in targeting Khagen Barman and the motive behind such killing.

This term is replied in two parts, namely, 1. Conspiracy in targeting, and 2. Motive behind killing.

I. Conspiracy in Targeting the Victim. Conspiracy in the context of the instant inquiry, will mean criminal conspiracy which is defined in Section 120A of IPC as follows:-

“When two or more persons agree to do or cause to be done-

(1) An illegal Act, or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing. As defined in Section 107 of the Indian Penal Code (IPC)

“ A person abets the doing of a thing, who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explanation -1. A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

Explanation -2 Whoever either prior to or at the the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act".

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the killing of Subarna Rabha has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators? It is in evidence that the family members of Subarna Rabha were requested by various Govt. agencies to persuade their younger brother Shri Nirbhoi Rabha, who has been an ULFA, and were forewarned by the army, the CRPF and police that if Nirbhoi Rabha could not be persuaded, by them to join the peace talks and bring peace, the consequences would not be good for the family. The persons who participated in the act of actual killing on the fateful night, must have been the same or their agents and accomplices and as such, there could be no other answer than that there was criminal conspiracy in the killing of Shri Uma Gogoi's family.

There is evidence to show that the SULFAs were enjoying protection from the police. This may have disabled the police from taking the right action against the SULFA in this case. Similar situation was found in case of Nalbari police sheltering SULFAs. Indeed the police-SULFA nexus has been submitted in arguments by the learned counsel for the Commission, the Government, and the parties. This means that the SULFA emerged as an extra-Constitutional authority. In case the SULFA were such a body of persons and were used by police either as an auxiliary, or as the striking arm, they would also be part of the conspiracy. We have already discussed that as conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In the killing of Shri Uma Gogoi's family, there were a number of persons in the act of killing. But there was a course of conduct involving the deciders of the course of action culminating in the killing. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of killing show that there must also have been some authoritative institutional assurance of safety to the killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being among the protectors against the victims they were bound to protect under the law, in this case. (II). Motive behind the killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence of P.W Smti Moni Gogoi. "I believe that after Jugal Phukan was taken away by the Army and the police and he was killed, from our neighbour Niran Gogoi's house and Niran Gogoi was reported to have said that ULFAs used to come to our house now and then, I believe that is why the incident in our family occurred." This statement was not challenged in cross-examination. Therefore, there could be no doubt that some Govt agencies having been a part of the conspiracy. The then Chief Minister published press appeals to the members of ULFA families to persuade their ULFA members to give up path of violence and surrender, the Army, the CRPF and the police accordingly advised the families, and also forewarned that consequences of failure to do so would not be good for the family and persuaded the members of Subarna's family in that line. The fact that there was a request made to the literary organizations and Sahitya Sabhas of the State to persuade the ULFAs to surrender is in the deposition of the then Chief

Minister Mahanta in another case of this series. A course of conduct by different agencies towards similar persuatuin and the forewarning that in case of failure to effect surrender consequences would not be good for the family of Shri Uma Gogoi, and thereafter finally culminating in killing of the family support such a conclusion beyond reasonable doubt..Contemporary similar killings brought in evidence of this case also showed that it was the consistent pattern to follow. The way in which in this case, as in all other enquired cases, the investigations were made to fizzle out and the F.R. (Final Report) was submitted shows that the police has been in collaboration with the killers. All these also prove that the entire scheme is being remote- orchestrated from the top of the department.. Who was in helm of the Deparments has to be held accountable and need be brought to justice. The matter being of criminal nature proof must be beyond reasonable doubt. The evidence in series of cases with common characteristics lead to such a conclusion beyond reasonable doubt. .

The immediate motive of the killers could be any reward or satisfaction emanating from those who harboured the ultimate motive and engaged the killers. The desire of a consequence is the motive for an action. The members of the family of Shri Uma Gogoi has been executed brutally, for no fault of theirs, and only for belonging to the suspected to be ULFA family, that was, for a status offence without any sanction of law and in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. The motive was the perpetuatgion of the AGP rule in the State of Assam by villainy, treachery and monstrous cruelty and dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material.. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as - a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the killing will mean that for which the killer has committed the killing, and without which he would not have done it. The motive might be betterment of prospects in em[loyment, servive, promotion and even better posting.

(D) Pinpointing responsibility on persons involved directly or indirectly in the killing.

This is the most difficult task of the Commission. In the absence of effective direct evidence, we have to depend on relevant circumstantial evidence. That, of course, is forthcoming in such extents as could help us in pinpointing responsibility on the persons involved. Fortunately the term of reference mentions "involved directly or indirectly in commission of killing" This enables us to act on basis of integrated evidence rather thsn on isolated ones. We have therefore to integrate such parts of evidence as will lead to a conclusion beyond reasonable doubt, for pinpointing responsibility. Besides what are found in relevant pieces of evidence, the common characteristics found in each individual case also throw some light. We have, of course, to follow the general principles of evidence enunciated by the authorities on evidence, in pinpointing the responsibility beyond reasobanlde doubt in this case.

Handwritten: The Best Evidence Rule. "Phipson on Evidence," 9th ed. P. 51 under caption : "The Best Evidence Rule. Strict Proof" Says: "The maxim that "the best evidence must be given of which the nature of the case permits." has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. The applicability of the rule depends on the nature of the subject to be proved. In the complicated nature of things today the emphasis has somewhat changed. (P.

53) According to Phipson, "In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admissions out of Court".

The Supreme Court says that conspiracies are often hatched in secrecy; and that circumstantial evidence is generally available in such cases. The similarity of the cases in this group of seven cases is therefore is relevant and admissible,

Best on "The Principles of The Law of Evidence." (9th ed) in its Introduction (pp.4-5) said:

6. "With regard to intensity of persuasion, the faculties of the human mind are comprehended in the genera, knowledge and judgment. 1. By "knowledge" strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term "certainty" is properly applicable. Knowledge is intuitive when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves; demonstrative when it is perceived mediately, i.e, when it is deduced from a comparison each with intervening ideas which has a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs, and lastly through the agency of our senses, we obtain a perception of the senses the existence of external objects, our knowledge is said to be sensitive. But knowledge and certainty are constantly used in a secondary sense, which it is important not to overlook; viz, as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods knowing them to have been stolen or that we are certain or morally certain, of the existence of such a fact etc."

7. 2. "Judgment", "the other faculty of the mind though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so.. The foundation of this is the probability or likelihood of that agreement or disagreement, of the truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation, and experience. Judgement is often based on the testimony vouching their observation or experience but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators."

The observation, accuracy and veracity of the narrating witnesses are, therefore, important. However, when no less a person than the then Superintendent of Police Shri K.C. Deka has stated about political interference of the Executive police functioning, one has to be cautious on the appreciation of evidence.

The following common characteristics of the first groups of seven cases and second group of eight cases are found in this case while answering its terms of reference so as to justify a finding of a general plan of "Ulfocide" i.e., deliberate killing of ULFAs and their families and relatives, on their basis, namely:

1. That this killing involved an ULFA suspected family, being that of Shri Uma Gogoi, and its investigation allowed to fizzle out...

2. Unlike in other cases, these killings, of Shri Uma Gogoi's family were committed in dead of night..

3.. The assailants were never detected or identified, no clue was found.

4. The weapon used in killing were firearms which were never seized or even found out.

o. The firearms being of prohibited bores, their forensic examination was not possible...

6. The vehicles used were never detected, seized or taken into custody. .

7. There were police patrolling in the crime areas posterior to, but not during, the killing.

8. That the army was ubiquitous. There was lurking evidence of Police-SULFA nexus in the killing, some of the latter being constituted into an extra-constitutional authority and used as the executioners. In this case the killing of all the six members of the family was followed by blasting of a bomb to destroy evidence..

9. There was general resentment and decry against the Unified Command Structure/ Chief Minister..

10. There was connivance of SULFA; and omission to make any SULFA an accused despite clues..

11. The investigation did not commensurate with the seriousness of the crime perpetrated..

12. That modern scientific methods of investigation, finger/foot prints, dog-squads were never used.

13. No condolence message was sent from the then Govt. of Assam to the victim family.

14. No ex-gratia/compensatory payment was made or offered by the then Govt. of Assam.in this case.

15 In this case death penalty has been imposed for "status offences," on Shri Uma Gogoi's family for being a member of suspected ULFA family of Shri Uma Gogoi...

16. That from evidence of this case, as in all other cases, "remote orchestration" of

"Ulfocide" is deducible These common characteristics, along with evidence, prove beyond reasonable doubt, remote orchestration of "Ulfocide" from Home Minister, through Police-SULFA nexus using some SULFAs as the striking arms or executioners. The authority has to be held liable and be dealt with according to law.

This conclusion is based on the similarities of all the cases in almost all respects which could not be so, unless there was remote orchestration from the highest authority.. The remote was supposed to have been at Home Minister level.

The responsibility may reasonably be pinpointed on the then Sivasagar District Police administration, and, with them, the then Sivasagar SULFA leadership. mentioned by the witnesses.in this case.

On the basis of evidence on record, the responsibility of persons involved directly or indirectly in killing of Shri Uma Gogoi's family has, therefore, to be reasonably pinpointed on the then protected Police-Sulfa nexus led by Sulfas Shri Kushal Duori @ Jayants Hazarika and Shri Mridul Phukan @ Samar Kakoti, of Sivasagar Town, and the then Sivasagar District Police administration, including the then O.C., Kakotibari P.S., and their assisters, facilitators and accomplices, almost giving an idea of State sponsornng. the killing of Shri Uma Gogoi's.family, garbing them as ULFA; though there was no evidence of their being Ulfas and no proof was produced. That was nothing but a cool and calculated murder of the members of the family The killers had no right to kill the members of Shri Uma Gogoi's family as they were not Ulfas, nay, not even if they were, which they were not. It is recorded that both Shri

over?

Kushal Duori @ Jayanta Hazarika, and Shri Mridul Phukan @ Samar Kakoti have denied their involvement in the killing and state that they have been wrongly implicated in the case.

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(1) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure. which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/ requisition by the State Govt. The Structure itself envisages its review after every three months,; and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para 14 of "Part I. INTRODUCTORY." of this report and is referred to in this context. The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State.. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire. first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy.. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

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The Army Districts. In para 15 we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission

has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; ammunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions would not countenance violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitions and/or some Ulfa related papers are put near the dead bodies. obviously for post mortem justification of the killings This will not stand on the way of the spade being called a spade...

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" **Sukracharya's Dandaniti is based on danda**, meaning, punishment. Ancient sages said that without *danda matsyanyaya will prevail* and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner..While no training course will be appropriate, considering their exalted position and prestige, periodical periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed,

some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea..their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters". trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law.

So far as the Government wings, agencies, and authorities, both official and political, the principle of "responder superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional and legal rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle should be followed and the political persons also be given fair field and no favour in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

This case should be revived and re-investigated.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation, ex gratia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case the entire family of six have been bombed out of existence. Except a married daughter none survives even to lament for the tragic extinction of the family. A foresighted alternative may be to create a befitting memorial in the form of a development centre at the family compound by granting an adequate amount to form the corpus of the same, and to provide for its lawful management committee. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, Assam, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to the Management Committee of Uma Gogoi Family Development Centre; headed by the Deputy Commissioner, Sibsagar District, Sibsagar, *ex-officio*, to form its corpus, a sum of Rs.30,00,000 (Rupees Thirty lakh) forthwith. The corpus will not be depleted. Only the income and

grants and collections be utilised for developmnt of Shri Uma Gogoi's family and the Mahmora area .Let there be four other members of the Committee, namely, Smti Moni Gogoi (daughter), shri Jugal Gogoi (elder brother) Shri Indra Borgohain (prominnt person of the Borbil area) and one nominee of the Chairman Deputy Commissioner. Let the Committee frame its own Rules of Business, and decide uts functions consistently with its objectives.. More than six years have already elapsed and it brooks no farther delay.

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SHRI KHAGEN BARMAN KILLING CASE

Hajo P.S. Case No. 40/2000

Date of Occurrence.17.3.2000

By this Commission's order dated 23.6.2006, by virtue of the authority conferred on it by the Government of Assam's Notification No.PLA.331/2005/2 dated 3rd September 2005, in continuation of the earlier Notification No.PLA 331/2005/1 dated 22.8.2995, after hearing the applicant on his application dated 25.5.206 and the learned Senior Counsel for the Commission and the learned Senior Govt. Advocate, Assam, finding the killing to have been within the period 1998 to 2001, it has taken up this case for inquiry, with notice to the State Government. Before taking up this apparently simple anti-extremist police case, the Commission noticed certain elements of encounter killing which, it thought, needed examination, in the interest of justice.

By virtue of the aforesaid Notifications the Commiaain is to inquire into, in each case,, the following terms of reference, and any other matters with recommendations, if any, namely,:

- (a) Circumstances, in each case, leading to the killing of the above mentioned victims.
- (b) Identity of the killer(s) and accomplice(s), if any.
- (c) To find out whether there was any conspiracy in targeting the victims and the motive behind such killings.
- (d) Pinpoint responsibility on persons who were involved directly or indirectly in the commission of such killings
- (e)To make recommendations to prevent recurrence of such killings
- (f) Any other matter related to or relevant to the purpose of this inquiry;"

“(A) Circumstances leading to the killing of Shri Khagen Barman.

hul. P.W. 1 Shri Ganesh Barman, aged about 45 years, father of deceased Khagen Barman, by profession a cultivator of Village Singimari, P.S. Hajo, District Kamrup, in his affidavit dated 24.5.2006 stated that his eldest son ShriKhagen Barman was aged about 22 years when he was brutally killed on 17.3.2000 by Shri B.K.Nath coming in a group of 16 persons when he, with his friend, Madha Barman, was enjoying a television programme in his drawing room

Describing the incident the deponent in para 8 of his affidavit states that on 17.3.2000 at about 6.30 P.M. the Officer-in-Charge of the Hajo P.S., Shri B.K.Nath, accompanied by about

16 armed persons whose faces were tied with black cloths, entered into Ganesh Barman's house, took his son Khagen Barman to the backside of his house and shot him dead by number of bullets. When he and his family registered protest at the Hajo P.S. they were tortured by the Hajo police. The deponent states that the illegal killing has caused serious sorrow, loss and deprivation to the family.

The post-mortem report of Dr. B.C. Roy Medhi Associate Professor of Forensic Medicine, Gauhati Medical College, shows the following injuries:

1. One bullet entry wound 1.5 cm x 1 cm with inverted lacerated margin having abrasion collar present on the lateral aspect of middle of right arm. The bullet passed obliquely downwards and medially through making an exit wound with everted lacerated margin. 3 x 2 cm on lowermost part of right arm.
2. Right humerus bone found fractured. Ligature mark on the neck not found.
3. One bullet entry wound 0.5 cm x 0.6 cm on uppermost part of right forearm with inverted lacerated margin and having abrasion collar. The bullet passed obliquely through the soft tissues making an exit wound measuring 3 x 2.5 cm on lateral aspect of lower part of right arm.
4. One bullet entry wound 0.5 x 0.6 cm on back of middle part right forearm. The bullet passed through soft tissues making an exit wound of 2.5 x 2 cm with inverted lacerated margin on medial aspect of upper part of right forearm.
5. One bullet entry wound 0.5 x 0.6 cm with inverted lacerated margin and having abrasion and contusion collar present on left lateral front of abdomen 8 cms above the left ant. sup. iliac spine and 10 cms left to midline. The bullet passed obliquely from left to right through the abdominal cavity and passed out making an exit wound 2 x 1 cm on right lateral front of abdomen 3 cm above the right ant. Sup. iliac spine and 9 cms right to midline.
6. One bullet entry wound 0.5 x 0.6 cm on left lateral chest wall 9 cms left to nipple and 6 cms below axilla. The bullet passed through into chest cavity towards right little obliquely downwards and passed out by making an exit wound, 2 x 1 cm on right lateral chest wall, 9 cm below and right from right nipple.
7. One bullet entry wound 0.5 x 0.6 cm on left lateral chest wall along posterior axillary line 10 cms below left shoulder tip. The bullet passed obliquely upwards through left chest cavity and passed out by making on left side of back of chest 1 cm left to mid vertebral line and 7 cms below of left from seventh cervical spine.
8. One bullet entry wound 0.5 x 0.6 cm on antero medial aspect of upper part of left arm. The bullet passed through soft tissues and bones towards lateral side and passed out making an exit wound on lateral side of left arm.

All injuries are ante mortem and caused by rifled fire armed weapons and homicidal in nature. Immediate death resulted from the injuries sustained on the body P.M. report is dated 18.3.2000.

The report of the Armourer on the seized items One .22 bore country made revolver serviceable firearm. 3 Nos of A.K. 47.

A sheet of letter pad of Ulfa of Saraighat Anchalik Parishad addressed to Ramesh Barman of Cillage Singimari signed by Tarik Ali along with seal and stamp of Finance Secretary, Saraighat Anchalik Parishad of ULFA, dated 25.11.99. One sheet of letter pad of Saraighat Anchalik Parishad, ULFA Madhyamandal addressed to "Dangaria with neither signature of sender nor seal and stamp.

Before the Commission, in his Examination-in Chief Shri Ganesh Barman, P.W. 1, said that he had a potato cultivation in a field about half a kilometer from his house where he dug some potatoes on 17.3.2000 afternoon and with his son, Khagen Barman, carried the potatoes to their Singimari home in a 'thela' when Khagen suggested that his father should take the thela and he himself drove the cattle home. Reaching home and preserving the potato, Ganesh was preparing his plough for next morning. Meanwhile Khagen's friend Madha arrived and sat in the drawing room T.V and Khagen joined him shortly after keeping the cattle. When the cattle started running helter skelter Ganesh Barman tried to see what happened, and he described:

"I found 15/16 persons in police dress accompanied by Shri B.K.Nath, perhaps O.C., Hajo Police Station, with their faces covered or wrapped by black cloths and having A.K. 47 rifles in hand came and surrounded my house. Few of them entered the house and asked who was Khagen Barman and my son, who was sitting there, said, 'I am Khagen Barman'. The moment he told that he was Khagen Barman, by about four of them dragged him out by the neck. Seeing this sight I made an entreiy that my son should not be taken that way but should be asked what was to be asked. Before I could finish my entreaty, Shri B.K.Nath, perhaps O.C. of Hajo Police Station, with his pistol knocked me between my left eye and left ear injuring me. I fell down and became almost senseless. I saw my wife approaching her son then some of the policemen pushed me inside a room and pressed the door hard so that I could not come out. while my wife was still with her son. Then I fell down inside the room and became unconscious."

P.W. 3 Smti Nilima Barman, mother of Khagen Barman corroborated her husband Shri Ganesh Barman in all material particulars saying that when Khagen Barman and his friend Madhab Barman were together, she saw from her kitchen that policemen were hastening to their house, by the time she could see them, they already took her son out of the room, one policeman holding his neck and running towards her son, she saw 4/5 policemen surrounding her son outside her house and she requested them not to take her son, but they threw her on the ground saying if I talked, I would be shot dead. Thereafter 2/3 men dragged him behind the house and closed her behind threatening her with dire consequences if she spoke. She could not see who shot her son but heard repeated sounds "Thereafter the police emptied one potato gunny bag and put her son's body inside it and tied the mouth of the bag snatching a hanging piece of cloth and took the bag to their vehicle. She did not see how many police vehicles were there..."

P.W. 2 Shri Premeswar Barman. said that he was in his room at about 5.30 P.M. and heard some running sound from his gate and coming out he saw about 15/16 persons in police uniform and covering their faces with black cloths were hastening towards his house and Shi B.K.Nath Second Officer of Hajo P.S. in civil dress, in civil dress, with ¼ other persons entered their room and asked who was Khagen Barman and Khagen Barman who was viewing a T.V. stood up saying he was Khagen Barman and immediately those persons took him out of the room and dragged him to the backside of his house and being asked by Nath, Khagen Barman to raised his hands and prayed that his life be spared, but B.K.Nath shot at him and ordered others to fire which they did by long rifles and 'shorter arms' till Khagen Barman fell down. He corroborated other witnesses that the parents, this witness and the neighbour woman were pushe inside the room and pressed the dooe behind us and that later they empried a potato gunny bag, put the dead body in it and drove away.

Khagen

P.W. 4 Ssmti Padumi Barman said that on 17.3.2000 in the evening they heard firing sounds and wanted to go out and see what had happened, but the policemen on the street ordered that they all should remain indoors and not come out; and she remained indoors

(B) The identity of the killers, and their accomplices, if any

The killing of Shri Khagen Barman was secret not as to time and place of killing, but as to the identity of the killers and their accomplices, if any. The identity of the killers and their accomplices, if any, has to be determined on the basis of evidence on record. It is a developed principle of law that accomplices are the parties to the crime. On the basis of degrees of complicity to the crime, accomplices are divided into perpetrators and accessories. An accessory is one who excites or helps the commission of a crime by the perpetrator. Perpetrator is exclusively the person who in law performs the crime. More precisely, the perpetrator is the person who being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea or negligence*. Thus, accomplices include, while accessories exclude, the perpetrator of the crime. However, often they are used as synonymous.

We discussed the meaning of "secret". In para 7 of the Introductory Part 1. Identification of the killers has to proceed on the basis of investigation and evidence which were scanty herein..

G.W 1 Shri B.K. Nath deposed that on 17.3.2000 he was serving at Hajo P.S. as W.P.(Watch Post) in- Charge At that time Shri Ajmal Ali was the O.C, but on that date he was not there at the P.S. and Shri Suresh Nath 2nd. Officer was the In-Charge. At about 1/1.30 p.m. (that day) when he (Mr.B.K.Nath) was at his quarter, and at that moment suffering from fever, a constable came to his quarter and informed him that the then S.P Shri B.K. Misra wanted him over the phone At first Shri Nath told that he was unable to go as he was suffering from fever for the past three days, but when the same constable came and said S.P. wanted him, Shri Nath came to the telephone when the S,P asked him to come to Guwahati despite his plea of sickness. B.K.Nath came to Guwahati residence of S.P. arriving by about 3:30 p.m. Asked why he came in civil dress, Nath explained his obedience to the order despite illness,. S.P. with staff, all in uniform, got ready by 5.30 p.m. and with Nath on the same vehicle proceeded without disclosing the destination, but after crossing the Brahmaputra bridge took the road to Hajo and arriving there straight drove to a house, left the vehicle leaving Nath and the driver in the vehicle, S.P entered the house.. Shri B.K. Nath then heard a firing sound which could be from backside of the house.

N.W.2, S.P.Shri B.K.Misra deposed that on 17.3.2000 he was the S.P. of Kamrup district, and he collected the deposition of Shri B.K.Nath, who was the SI attached to Hajo P.S. on the date of occurrence, involving him. On 7.3.2000 at about 6.30 p.m. he (Mr Misra) visited the Hajo P.S. and after half an hour an information came, as the Thana staff informed him, that some meeting was going on in the house of ULFA extremist Shri Khagen Barman at Singimari, and police immediately proceeded thereto, led by Shri B.K.Nath and he also accompanied them. Reaching the house at 7 p.m. they entered the house and some boys ran towards the rear side of the house and went near the bamboo grooves and then they started firing at the police party who also retaliated After 5/6 minutes when firing ended police searched the area and found one dead body which was identified as that of Khagen Barman. ULFA extremist, while the others escaped. The case was accordingly registered and investigated. "In course of further investigation of the Hajo P.S. case No. 40/2000 it was revealed that Shri Khagen Barman was earlier arrested on 6.12.98 in connection with the Baihata P.S. case. He did not know what was the fate of the case as he was transferred out in August 2000. . . .

N.W.1 Shri Suresh Ch, Nath deposed that on 17.3.2000 he was the Second Officer of Hajo P.S. and the O.C. Shri Ajmal Ali being on Sick leave, he was functioning as the Officer-in-Charge that day. At about 19,30 p.m. S.I Shri B.K.Nath of Hajo P.S. lodged an FIR. He was bringing a dead body of one Khagen Barman of Singimari village under Hajo P.S. to the effect that "On receipt of information from reliable sources that a group of ULFA militants armed with sophisticated weapons were holding a meeting in the house of extremist Shri Khagen Barman of Singimari. self along with a police party left immediately and reached at that place at around 7 p.m. on 17.3.2000. On seeing the police party the extremists ran towards bamboo grooves on the rear side of the house and started indiscriminate firing on the police party. The exchange of firing continued for about 10 minutes After firing was over the area was thoroughly searched and the bullet ridden body of Khagen Barman was found lying there. Police also found one country made revolver and some ULFA related documents along with some empty cases near the dead body and after discharging of all formalities those were duly seized. The remaining ULFA militants managed to flee away taking advantage of darkness and thick bamboo bushes. On further inquiry it was learnt that it consisted of ULFA militants, namely, (1) Shri Dhiren Das, of village Dadara, (2) Shri Rupjyoti Boro of Kalitakuchi, (3) Shri Bhaba Kalita of Sesamukh, and (4) Shri Kashyap Baishya of Bansor and (5) Shri Madhab Kumar of Kumrapara, both under Sualkuchi P.S. and others. The operation was supervised by the S.P Kamrup locally."

Mr. Suresh Nath, receiving the FIR, registered Hajo P.S. Case No. 40/2000, adopted the investigations made by Shri B.K.Nath and himself investigated the case and searched the houses of the alleged extremists but neither found them nor any objectionable material, He does not say that he visited the place of occurrence.

N.W.3 Shri Ajmal Ali, O.C. Hajo P.S. deposed that on 16.3.2000 he took casual leave to enjoy the Bakr Id and so was not on duty on 17.3.2000 and the next day, on his joining on 19.3.2000 he found the case was investigated by Shri Suresh Nath which he allowed to continue.

Shri B.K.Misra, then S.P., was on his request, permitted to cross examine Shri B.K.Nath on

10.3.2007. Most of the questions put in cross-examination were irrelevant for the purpose. The scenario of the operation remained the same. Shri Misra asked Shri Nath as to why he violated his oath taken in the name of the Constitution of India, thereby indicating that Shri Nath having submitted the FIR in the case why he later said that he was made to write the FIR and do the rest in the case by the S.P Shri Misra himself. Shri Nath reiterated that he was compelled to do so by Misra. This, however, did not amount to denying that Shri Misra did not direct Shri Nath to write the FIR and submit it at the Police Station. Misra then asked Shri Nath whether he complained to higher authorities, Nath replied that he complained to Misra himself and not to higher authorities as he did not know to whom he was to complain. Asked whether he applied for medical leave on that date of the incident, Nath replied that he was taking medicine from the pharmacy and was to consult the doctor, meanwhile he was called to Guwahati headquarters by Misra. Shri Misra asked Shri Nath as to why he did not keep the Thana ULFA list by including the name of Shri Khagen Barman after the Baihata incident wherein Khagen Barman was arrested. Nath replied that he was only Watch Post S.I. and neither the O.C. nor the Second officer, and it was not his duty to revise the ULFA list by including Khagen Barman's name. moreover he did not know the fate of the case. This gave the Commission the impression that Khagen Barman's name did not figure in the ULFA list of Hajo P.S. at the relevant time. To contradict Nath's statement in Ananta Kalita's case, Misra asked:

"Q. Did you see me carrying any small arm during the operation ?

A. Yes, there was a small arm with you.

Q. Did you also see me firing with my weapon or did you receive any empty case of 9 mm pistol or revolver from the place of occurrence?

A. No.

Q. Can you say the Hon' ble Commission whether any SULFA member was involved in this case?

A. I do not know."

Shri Misra then held in his hand what he called the record of arms and ammunitions on 19.11.98 by Armourer of Kamrup district, which, he said, remained intact when he was transferred and deposited the arms and ammunitions on 5.8.2000 and asked Nath how it could be so, Nath replied that he did not know. It was explained by Misra that the 9mm revolver and the 12 rounds of ammunition issued to him remained the same when he deposited the same on his transfer after the Khagen Barman killing case, implying thereby that he did not kill Khagen Barman, and, according to him, this clearly showed that no shot was fired from his revolver/pistol at all and Nath's evidence that he shot down Khagen Barman was not correct. The paper was to be delivered to the Commission in the next day hearing, but Misra could not be present on that date. No question was put to show that Shri B.K.Nath was not called by the S.P. to Guwahati that afternoon, on the other hand Nath repeated the whole story as to how he was sick at his quater, a constable came and informed that Nath was wanted at the phone by S.P, Nath first refused to move to the phone as he was ill and asked the constable to tell S.P., how second time the caonstable came and said again S.P. wanted him over phone and how this time over phone S.P. called him to Guwahati, how he went there in civil dress, and how in S.P.' s vahicle he and few other persons came to Khagen Barman's house. It is noted that when asked whether he could inform the Commission whether there was any SULFA involved in this operation, Nath replied that he did not know. It was not denied..All these showed that Nath' s version so far was correct and not denied. No doubt was created on the versions of Ganesh Barman and other public witnesses in the case. In fact those were not challenged in the cross examination by Misra. All these are being considered appropriately

From the above evidence, in the police version itself, some questions arise, namely, what was the precise information received and by whom so as to make the police party move to Singimari. Who received the information, how the S,P happened to move from Guwahati and with whom, how many vehicles and how many people were there in the party, where were Shri Khagen Barman and with whom,, where Khagen Barman was shot dead and by whom, and how many people, why the lodging of FIR was so late, whether the empty cases and the factory made pistol examined by forensic/ballistic exoperts, etc.Over and above these,the question whether the version of Shri B.K. Nath, or that of the S.P. Shri B.K Misra was the true version?.

We may take the last questions first According to B.K.Nath, despite his illness and reluctance, he was called by the S.P to Guwahati wherefrom he, though ill and in civil dress, had to accompany the S.P to Khagen Barman's house and when he remained on the vehicle, while the S.P went to the house and he heard firing from the rear side of the house. He mentioned of firing shot.. There is no mention of any encounter. B.K.Nath in his deposition mentioned firing shot. The police party is said to have arrived later. In the S,P,'s version he himself happened to come from Guwahati to the Hajo P.S where the information of some ULFA extremists holding a meeting in the house of Khagen Barman was received and accordingly B.K.Nath arranged to proceed with police party to Khagen Barman's house, and the S,P, also accompanied the party. This discrepancy, to speak frankly, is suspicious, Shri B.K.Nath did not deny that the FIR and early writings of the case were in his handwriting, but

Kath:

he clarified in cross-examination that it was as per order of higher authority, perhaps meaning the S.P. whose presence and supervision of the operation has not been doubted. The regular O.C. Shri Ajmal Ali being on leave, Shri Suresh Nath was functioning as the O.C. on 17.3.2000, but he did not direct Shri B. K. Nath to lead the party, so the order must have been from the S.P. himself. Shri B.K.Nath proceeded with the investigative steps which pre-registration steps later Shri Suresh Nath adopted. Those steps must have been on direction of the S.P.. According to B.K. Nath the S.P. was not guided by him to the Singimari house of Khagen Barman. It could not be presumed that the S.P. himself knew the house earlier. Therefore, the possibility of someone guiding the Maruti Gypsy of S.P. could not be ruled out. Of course, in the S.P.'s version this problem might have been there. The question as to who received the information from the reliable source may not be difficult. That Shri B.K.Nath did not receive is clear. Ajmal Ali was on leave. Shri Suresh Nath who was officiating O.C. did not say that he received it or made any entry to that effect. By process of elimination it was the S.P. to have received it. B.K. Nath's version is consistent with it. This also leads to the conclusion that the S.P. himself made the party to move. According to S.P. he came to Hajo P.S. at about 6 P.M. and sometime thereafter Hajo P.S. staff told him of the information about the extremists. The question who were in the party is not clear, B.K. Nath said After the firing shot was heard from the rear side of Khagen Barman's house, a police party arrived there. Nothing is stated as to who and how many were there in the party. Exactly where Khagen Barman was, is not clear, only thing said is the extremists ran to the backside bamboo grooves may imply they were near the house or even inside it. The total number of extremists, according to police version was 6, Khagen Barman and 5 others named above.

The confusion is worse confounded when the police version is compared with the version of inmates of the house, mainly the parents of Khagen Barman. (P.W. 1) saw 15/16 persons with their faces covered with black cloths., according to him led by B.K.Nath (perhaps O.C. Hajo) whom he knew. The state of things raises many questions. Khagen Barman was inside their drawing room with his friend Madhab Barman. Police first brought him (Khagen) out by the neck and then took him to backside of the house where he was repeatedly shot and killed. At that time both the parents were pushed inside a room of the house and the door pressed hard so that they could not come out. Before that they made requests not to take their son out and to the backside. The vivid description makes their story credible as those are studded with vivid details. As against these, both Shri B.K.Nath and the S.P. were present at the place of occurrence, of course, Mr Nath in the S.P.'s parked vehicle and according to S.P. Nath led the operation and S.P. supervised it locally..

About the encounter, Shri B.K.Nath's version does not mention it. Only firing sound was heard. According to the FIR, admittedly written by Shri B.K.Nath, there was mutual firing, the boys from the bamboo grooves, and the police party from near the house facing them.. However the weapons of extremists have not been stated. Only one factory made revolver is shown to have been found near the dead body of Khagen Barman. The police party is said to have been using A.K. 47 rifles. The encounter is said to have continued for 10 minutes. Only two empty cartridges have been shown to have been recovered from near the dead body. No bullet marks at all have been found on the walls and other parts of Khagen Barman's house. Nor were any bullet marks seen on the bamboo grooves used as shield by the six extremists. There is, therefore, reasonable doubt in the police version.

It is seen that the security forces had been having a tough time in controlling extremist activities. It may also be height of blasphemy to call them unreliable. But the fundamental rights to life and liberty of the citizens stand above all other rights. Any allegation of their violation has, therefore, to be looked into with care and caution. The ruler is above everyone, but under the Constitution and the law. The alleged encounter of the police party against the

h.k.

said extremists is, therefore, not beyond scrutiny. A fake encounter may amount to murder in the eye of law..

Encounter vis-a-vis Murder.

In early Norman times (in England) murder and manslaughter were not distinguished. Every homicide was felonious, unless it was justified, or within the limits described above, excusable. Among the Germanic peoples on the continent a distinction had been drawn between an open killing which was emendable (emend= to remove faults or blemishes, perhaps because it partook of the nature of a fair combat) and a secret killing which was not. Cases of secret killing were classed as *morth* and it is from this that our word 'murder' has come. Under the law of William the Conqueror if a Norman was slain and the slayer was not produced, the district (the hundred) had to pay a fine, and the name *mardrum* was given both to the homicide and to the fine in such a case. But in the twentieth century every homicide that was grave, whether secret or not became unemendable, and the term *mardrum* gradually came to be used to describe a homicide of the most heinous kind. But it is in connection with the ancient view that a secret and treacherous killing especially when it was effected by lying in ambush for the victim was unemendable that, as it would seem, the allegation that the homicide was done with *malice aforethought*, or *malice prepense* had its origin. This development was assisted by the policy of the courts in quite early times of tempering the severity of the law for a man who, inflamed by the sting of a sudden provocation, had forthwith slain his attacker.

"Murder then is the most grave kind of felonious homicide. Its essential elements have never been defined by statute (in England) but it is traditionally said to be, when a person, of sound memory and discretion unlawfully killed any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied" (Kenny, **Criminal Law**, pp 116-117)

In England, since murder is a crime at common law *mens rea* is required. In India the Indian Penal Code 1860, the ingredients of murder have been dealt with different sections of Chapter XVI as "Of Offences affecting Life." in sections 299 and 300 and 301, and their punishments in sections 302 to 304.

"S. 299. Culpable homicide. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

S. 300. Murder. Except in cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly.- if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused, or-

3rdly,-If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly,-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse of incurring the risk of causing death or such injury as aforesaid

The English law excuses a person who has been forced to commit an offence by fear of death or of grievous bodily harm, except in cases of treason or homicide.

S. 96 Things done in private defence. Nothing is an offence which is done in exercise of the right of private defence.

S.97. The right of private defence of the body and property. Every person has a right, subject to the restrictions contained in section 99, to defend-

First, his own body and body of any other person against any offence affecting the human body;

Secondly, the property whether movable or immovable of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass

S.99. Acts against which there is no right of private defence.-There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by the direction of a public servant. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities..

Extent to which the right may be exercised..

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence..(The two Explanations are not applicable to this case). Thus, the right of private defence arises on the moment of reasonable apprehension of death or grievous hurt and not otherwise. The imminence of the danger, and reasonableness of the apprehension, and the proof thereof have to be considered. Glanville Williams discussing how imminent must be the danger says:

"It is sometimes thought that defence is allowed only against immediately threatened violence. Clearly force may not be used to meet a threat of violence in the future, because it cannot be said that the force is necessary at the present moment. But if there is a present hostile demonstration that violence is about to be used the defender need not wait till his assailant comes within striking distance, or put his finger on the trigger. To this extent the "pre-emptive strike" is lawful. One can imagine a case where the attacker is going off to summon reinforcements and the defender realises that if he does not shoot him now, he will be lost; in such circumstances shooting should be justified" Imminence is implied. It is not reasonable to use force until the occasion arises. Discussing the question whether a mistaken belief would be enough, the author says 'Nearly all the authorities require it to be reasonable. They take the "objective" view that the defendant's honest belief is no defence to the charge if it was unreasonably arrived at.. The right of private defence or self defence has to be exercised reasonably and even circumspectively, particularly when its result is the death of a person. In fact, the right is, in a sense, denied when it results in death of the person against whom it has been exercised. ..

Formidable Problem of Proof. Glanville William. in his Textbook of Criminal Law, asks. If two men fight, and one says he was acting in self-defence, is not there a formidable problem of proof? Yes, and, in particular, a person kills in what he conceives to appear to be self defence is subject to the serious risk that the emergency will not appear to the jury in the same light that it appeared to him. When looking back at the incident, the fact likely to make the situation impression that a man has been killed, the transitory fear felt by the accused

key

person has left no memorial to compare with the tragic reality of the corpse. If there is a survivor of the incident on the other side, his account of what has happened is likely to differ essentially from that of the accused. Even impartial spectators are unreliable witnesses to a sudden affray that is over in a few minutes or seconds. When the issue is one of self-defence, everything depends on which side was the aggressor, and the temporal order of events is therefore of high importance. But, experiments indicate that it is difficult to establish by oral evidence. In particular, witnesses have been shown to have been unable to recall words with accuracy. Hence, there arise two dangers in the administration of the law, unjust conviction and unwarranted acquittal after a concocted defence. Of the two risks, the former has to be taken the more seriously, and for this reason the law casts the burden of negating the defence of self-defence upon the prosecution, only the evidential burden being rested on the defendant. If the case is clearly one of self defence, the Judge will not even allow the case to go to the jury." (P. 449)..

In the context of the secret killing cases it would be necessary to ascertain the correct attitudinal/legal approach to the killing of the victim on the part of the army men/policemen/SULFA. To be precise, seeing one person, whether he was to kill him or to capture him which he could do even by chasing and if required maiming and disabling him. In other words, did the victim already has reached the end to his right to life and liberty, so that he could be killed or shot at sight?. If the person was already known for certain to have been an Ulfa, could he be shot and killed, and if it was not certain whether he was an Ulfa or not, was it not the killer's duty first to ascertain and then deal with him accordingly? Usually, in this part of the country, what is being seen is that the army men, and the (militarised) policemen, perhaps for being in the same Unified Command Structure, assume themselves to have been required or authorised to kill the suspected Ulfas/extremists straightway.. Very often some make-belief posthumous evidence is laid near the dead body to show or prove that the victim was an Ulfa or in Ulfa mission. This perhaps shows in what casual manner the human right to life and liberty is often being dealt with/ defrauded by these State agencies personnel.. These questions have to be considered in the prevailing background situations, namely, the state of Assam has been declared a disturbed area under the Assam Disturbed Areas Act/ The Armed Forces Special Powers Act, 1958 since extended to the North Eastern States..

Encounter killing by encounter specialists or extra-judicial killings have been reported frequently and one can say that the act of extra-judicial killing, which is a gross violation of the Justice system, the very basis of our Constitution by denying the fundamental right to life, and liberty, the civil liberties and the human rights. Encounter and extra judicial killings tend to abound in the State..

More than two centuries ago, Blackstone, the best known of the expositors of the English common law, taught that "all homicide is malicious, and of course, amounts to murder, unless justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. Tucked within this greatly capsulized scheme of the common law of homicide is the branch of law, of course as codified in the Indian Penal Code. we are called upon to administer today. No issue of justifiable homicide, within Blackstone's definition is involved in this case. On the other hand, the police version is that the killings were in an encounter between it and the deceased persons. Was it really an encounter or an extra judicial killing that has to be determined. Law will not countenance an act of extra judicial killing, which is a gross violation of the Justice system, the very basis of our Constitution as it amounts to denial of the victim's fundamental right to live, the civil

liberties and the human rights, and violation of the rule of law. It is all the more dangerous if it is done by those whose duty is to protect the lives and liberties of the citizens under the law. We have to see why the police did not try to catch the person alive before shooting him dead, and whether he did so for pleasing his employers or for betterment of his prospects in service.. or it is due to negligence and indiscipline in the Service.. In fact in all the cases where there appeared to be some semblance of an encounter, the Noticee witnesses were asked as to under what provision of law they could kill the Ulfa ? The reply was ' the law of private defence " What exactly is that law has, therefore to be seen. the Indian Penal Code provides:

Extent to which the right may be exercised..

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence..(The two Explanations are not applicable to this case). Thus, the right of private defence arises on the moment of reasonable apprehension of death or grievous hurt and not otherwise. The imminence of the danger, and reasonableness of the apprehension, and the proof thereof have to be considered. Glanville Williams discussing how imminent must be the danger says:

"It is sometimes thought that defence is allowed only against immediately threatened violence. Clearly force may not be used to meet a threat of violence in the future, because it cannot be said that the force is necessary at the present moment. But if there is a present hostile demonstration that violence is about to be used the defender need not wait till his assailant comes within striking distance, or put his finger on the trigger. To this extent the "pre-emptive strike" is lawful. One can imagine a case where the attacker is going off to summon reinforcements and the defender realises that if he does not shoot him now, he will be lost; in such circumstances shooting should be justified" Imminence is implied. It is not reasonable to use force until the occasion arises. Discussing the question whether a mistaken belief would be enough, the author says 'Nearly all the authorities require it to be reasonable. They take the "objective" view that the defendant's honest belief is no defence, to the charge if it was unreasonably arrived at.. The right of private defence or self defence has to be exercised reasonably and even circumspectively, particularly when its result is the death of a person. In fact, the right is, in a sense, denied when it results in death of the person against whom it has been exercised. ..

In the instant case, there is no evidence of there having been firing from the side of the alleged extremists. The five extremists alleged to have fled away were not available when Shri Suresh Nath visited their huses. Their weapons were not described, At any rate the two empty cartridges of A.K,47 rifles, which were recovered from the place of occurrence, could not have been fired by the extremists, inasmuch as Khagen Barman was not taken to have been killed by the other alleged extremists. Nor could Khagen Barman challenge the police party with the pistol (said to have been found near his dead body) with its limited range. The most important fact is that not a single bullet mark has been recorded anywhere at the place of occurrence. The statement of P.W.s that the men covered their faces with black cloths has gone unchallenged in evidence. This makes the killing even more curious. Shri B.K.Nath, when cross examined by Shri B.K.Misra did not deny the involvement of Sulfas in the operation. The killing of Shri Khagen Barman, under the facts and circumstances of the case could not be taken to have been in encounter, as alleged, but a cool and calculated murder. On the basis of the above evidence the identification of the killers may reasonably be confined at least to Shri B.K.Nath, the S.P Shri B.K.Misra, and the policemen and the concerned Sulfas who were with the party as on record of the Hajo Police Station and

otherwise.. The staff in the vehicle of S.P. has not been stated to have played any role.. So also the Hajo Police party in Nath's version. The source was also not stated.

(C)Whether there was any conspiracy in targeting Khagen Barman and the motive behind such killing.

This term is replied in two parts, namely, I..Conspiracy in targeting, and II.. Motive behind killing.

I.Conspiracy in Targeting the Victim. Conspiracy.in the context of the instant inquiry, will mean criminal conspiracy which is defined in Section 126A of IPC as follows:.

“When two or more persons agree to do or cause to be done-

(1) An illegal Act, or

(2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the material Act is the ultimate object of such agreement or is merely incidental to that object.

Abetment of a thing. As defined in Section 107 of the Indian Penal Code (IPC)

“ A person abets the doing of a thing . who-

First- instigates any person to do that thing; or

Secondly- engages with one or more other person or person or persons in any conspiracy for the doing of that thing.if an act or illegal omission takes place in pursuance of that conspiracy , and in order to the doing of that thing ; or

Thirdly, institutionally aids, by any act or illegal omission, the doing of that thing.

Explation -1.A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures. or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing; or (Illustration omitted).....

Explation -2 Whoever either prior to or at the the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof. is said to aid the doing of that act”.

The law and jurisprudence of conspiracy has been discussed in para 10 of the Introductory Part I of the First report and the same is referred to...The question whether there was any conspiracy or not in the killing of Khagen Barman has to be decided on the basis of the law, and facts in evidence on record. In case the answer is in the affirmative, then also the question will be as to who were the conspirators?

We have already discussed that as conspiracies are often hatched in secrecy, these circumstantial evidence will be relevant and admissible. In the killing of Khagen Barman there were 15/16 persons in the act of killing.But there was a course of conduct involving the deciders of the course of action culminating in the killing. Considering the facts of this case in light of definition of conspiracy, it can surely be held that there was a long drawn course of action amounting to conspiracy. The manner of planning and execution of the act of killing show that there must also have been some authoritative institutional assurance of safety to the killers after the act was completed. Therefore, it is held that there was conspiracy of the worst kind, being among the protectors against the victims they were bound to protect.under the law, in this case.

II. Motive. behind the killing may be analysed as direct or immediate; and the ultimate. Regarding the ultimate motive, there is evidence of P.W 1 that there could be no other reason for killing of his son Khagen Barman. who was not in the ULFA. This statement was not challenged in cross-examination. On the other hand from cross-examination of B.K.Nath by B.K.Misra it could be inferred that Khagen Barman's name was not there in the ULFA list of Hajo P.S. Nobody could say what was the fate of the Baihata P.S. case wherein Khagen Barman was said to have been arrested. Therefore, there could be no doubt that the killing party was a part of the conspiracy. It has also been seen that there was constant pressure on the police authorities from above to apprehend ULFAs, and consequently capturing/killing Ulfas came to be linked with prospects of better posting and promotion in service. The way in which, Khagen Barman has been killed leaves no doubt that the killers expected complete immunity for their act of killing, as it was supposed to have been in performance of duties, and law protects them in lawful cases. However, in this case wrecklessness is staring at the face.. The way in which in this case, as in all other cases, under inquiry, the investigations were made to fizzle out and the F.R. (Final Reports submitted shows that the police has been situational killers. All these also prove that the entire scheme is being remote- orchestrated from the top of the department...

II. Motive. The immediate motive of the killers could be any reward or satisfaction emanating from those who harboured the ultimate motive and engaged the killers. The desire of a consequence is the motive for an action. Khagen Barman had been killed garbing him as ULFA. Yjr fact that in cross examination asked B.K.Nath as to why he did not update the ULFA list of Hajo P.S. by including the name of Khagen Barmaan therein showed that his name was not there in the list and nobody knew the fate of the Bauhata P.S. case in which Khagen Barman was allegedly arrested and let off, and yet Khagen Barman was suspected and brutally killed, as was evident, in the case, in blatant violation of the victim's Legal, Constitutional and Human rights. Intention and motive are often used synonymously. Perhaps the motive was the perpetuation of the AGP rule in the State of Assam by villainy, treachery and monstrous cruelty and dangerous propensity. In Criminal law the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. In such cases while motive is immaterial, intention is material.. In the Explanation to section 161 IPC "a motive or reward for doing is illustrated as - a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done. In this sense, motive of the killing will mean that for which the killer has committed the killing, and without which he would not have done it. We have to ascertain from the circumstances, anterior, present and posterior to the incident of killing. The anterior circumstances were that Khagen Barman was garbed as an ULFA, a banned outfit, without producing any proof thereof. Life of citizens will be precarious indeed where one could be killed on suspicion without producing any proof. Justice, Democracy and Republicanism seem to have deserted the State..

(D) Pinpointing responsibility on persons involved directly or indirectly in commission of killing.

K.S. Under the peculiar facts and circumstances of the case, the Commission refrained itself from pinpointing responsibility on persons involved directly or indirectly in commission of the killing.

(E) Recommendations to prevent recurrence of such killings.

With its limited knowledge, experience and wisdom, to prevent recurrence of such killings, the Commission would like to make twofold recommendations, namely, (1) the immediate, and (2) the long term.

(1) The immediate measure is, first to try to keep in abeyance, and then gradually dismantle the existing Unified Command structure, which is neither a statute nor a statutory order, but only an arrangement agreed to by the Centre and the State Govt. regarding deployment and operation of the armed forces and other forces of the Union deployed by the Central Govt, "in aid of civil power" of the State of Assam, on request/ requisition by the State Govt. The Structure itself envisages its review after every three months,; and there is no limit to the review and may even envisage its dismantling. The parties concerned may agree to dismantle it in the same way they agreed to create it. The constitutional position as to deployment of the armed forces and other forces of the Union in a State has already been discussed in para 14 of "Part I. INTRODUCTORY," of this report and is referred to in this context. The deployment of the armed forces and other forces of the Union in the State of Assam has been "in aid of the civil power of the State." In case of the civil power of the State being sufficient enough to cope with its civil problems, *ex hypothesi*, there is no need of armed forces or other forces of the Union for the State.. The armed forces and other forces of the Union were deployed to cope with the internal disturbance thought to have been caused by the activities of the banned outfits disturbing the area leading to its declaration as a disturbed area under the Disturbed Areas Act. However, the disturbance has to a great extent been under control. The life in the State has become normal. The last Assembly election could be held without any disturbance, thanks to the co-operation of the local banned outfits. This may be an appropriate time for effective talks with the local outfits to observe cease fire, first for a short period, say six months, and for gradually longer and longer periods, and for restoration of normalcy and confinement of the armed forces and other forces of the Union to the barracks, and on continuation and assurance of normalcy, ultimately withdraw, on an assurance of peace on the part of the banned outfits and ultimately lifting of their bans themselves. To achieve this, strenuous, but cordial, talks between the outfits, the State Government and the Central Govt would be necessary; and there is no reason why such talks should not succeed. Restoration of normalcy. Disturbance and insurgent activities invited the Unified Command Structure. It is in the hands of the people to assure that peace will be maintained and insurgent activities will be curbed and normalcy will be restored. If the public are serious in this restoration of normalcy, there can be no earthly reason why such a situation cannot be brought about by mutual co-operation of the State and its people. Modalities may be worked out in consultation and cooperation among the Government, the political parties, student organizations, the outfits and the general public. Restoration of normalcy will also effect economy.. Meanwhile, in the interest of peace and tranquility, there should be no witch hunting. Constitutionally speaking, restoration of normalcy is the terminus of internal disturbances and army deployment in the State.

. The Army Districts. In para 15 we discussed the structure and functioning of the Unified Command Structure. In course of the Commission's hearing sessions in the Upper Assam district of Sibsagar it was learnt that the Upper Assam districts of Tinsukia, Dibrugarh, Dhemaji, North Lakhimpur and Sibsagar have been declared as Army districts and that, as a result, Army has been operating in those districts. In so far as the declaration is concerned, this Commission has nothing to do. As the Commission has to enquire into some criminal cases of some of those Upper Assam districts, the Commission has to see whether this declaration had any impact on those cases. The Commission proceeds on the basis that during the period from 1998 to 2001 also similar declaration could have been there in those districts, and the Unified Command

Structure and the Armed Forces Special Powers Act were necessarily in operation in those districts. If that was so, what were the functions and powers of the Army thereunder would be relevant in the context of prevention of such killings. We have already discussed this, including the leading case, in para 15. The Armed Forces (Assam and Manipur) Special Powers Act, 1958 was amended by the Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972; and it is now The Armed Forces in the State of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram Special Powers Act, and it is extended to all these North Eastern States. By section 4 of the Amendment Act 1972, section 3 of the principal Act stands substituted, namely,

"3. If in relation to any State or Union Territory to which this Act extends, the Government of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area."

The Armed Forces Special Powers Act does not enable the Armed forces to supplant or act as substitute for civil power after a declaration has been made under section 3 of the Act. The power conferred under Clause (a) of section 4 of the Act can be exercised only where any person is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or firearms; ammunitions or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law, e.g. under the Cr.P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order, the power conferred under clause (a) of section 4 cannot be exercised. Similarly, under section 5 of the Act, there is a requirement that any person who is arrested and taken into custody exercise of the power conferred by the clause (c) of section 4 of the Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

Maintenance of public order involves cognizance of offences, search, seizure and arrests followed by registration of reports of offences (F.I.R.s), investigation, prosecution, trial, and in the event of conviction execution of sentences. The power conferred under the Act only provide for cognition of offence, search, seizure and arrest and destruction of arms dumps and shelters and structures used in training camps or as hide-outs for armed gangs. The other functions have to be attended to by the criminal justice machinery. Thus, the functions in aid of civil power have been ruled by law and not by discretion. The deployment of the Armed forces of the Union in a State does not in any way deprive the people of the disturbed area of the State of their fundamental rights to life and liberty. Any violation of such rights under such provisions would not countenance violation of Constitutional and human rights of the people by the Forces deployed in aid of civil power, nor would it prevent fake encounters from being murders, or a crime from being a crime, punishable under the law.

Throughout evidence the official witnesses say that they kill the boys in self defence. The idea varies, and some seem to be of the view that Ulfas are to be shot at sight. Fake encounters are often reported in news papers. Almost always some obsolete weapons/ammunitions and/or some Ulfa related papers are put near the dead bodies. obviously for post mortem justification of the killings This will not stand on the way of the spade being called a spade...

(2) The long term measures are meticulous observation of the provisions of the Constitution and the laws in carrying out each and every function of the government. All the departments of the Government must function faithfully in accordance with the mandatory provisions of the Constitution of India. In other words, the **long term measures** may include, in the long run, the faithful obedience to, and implementation of, the Constitution and the laws of the country. The Centre-State relationship must also be in accordance with the mandates of the Constitution. Guidance of the famous Sarkaria Commission's report will be helpful in this regard. Manusmriti said (Buller) VIII, 351. "By killing an assassin the slayer incurs no guilt, (whether) he does it in public or secretly; in that case, fury recoils upon fury." 386. "That king in whose town lives no thief, no adulterer no defamer, no man guilty of violence and no committer of assaults attains the world of Sakra (Indra)"; 420. "A king who thus brings to a conclusion all the legal business enumerated above, and removes all sin, reaches the highest state (of bliss)" Sukracharya's *Dandaniti* is based on *danda*, meaning, punishment. Ancient sages said that without *danda matsyanyaya* will prevail and the strong will devour the weak, even the sacred *prasada* of the *yajna* will be swooped at by crows. *Danda* keeps awake when the country is asleep. All people have innate goodness in them, but some do not. In the absence of punishment those will demoralize others in the society. The norms and laws of today are not materially different. Secret killing amounts to denial of all the constitutional, legal and human rights to the killed, and violation of all these rights by the killer. If killing is by public authorities, it also means trampling over the oaths taken by them on assumption of public offices. The society need be protected from the people with such dangerous propensities. It is trite learning that every action has a reaction, fury generates fury and that brutalities generate more brutalities. Continuous disturbance of the even keel of the society and some excesses committed by some elements had to be checked by equally harsh measures, but that would not justify the lawfully established Government in abdicating its powers, duties and responsibilities to extra-Constitutional organs jeopardizing the legal, fundamental and human rights of the citizens of sovereign, socialist and democratic Republic of India.. Those who are entrusted by the people to govern them, ought to be well versed with the provisions of the Constitution of India and the relevant laws, rules, and administrative instructions, and orders framed thereunder. They should be aware of the constitutional limitations as also the rights of the citizens of the State against their State itself. Fundamental rights of citizens, including rights to life, liberty, freedoms, non-discrimination etc. must not be violated. They must never have propensity to kill the citizens they govern, secretly or openly. They must not harbour any kind of hatred or dislike on numerical, religious, communal, racial, ethnic, social, historical, or of any sort whatever. At the minimum they should be true to their oaths and be absolutely free from corruption in any form and manner.. While no training course will be appropriate, considering their exalted position and prestige, periodical periodical seminars and discussions at government levels may refresh their knowledge and experience.

The Police department is the first resort of the people for protection of their life, liberty, property etc. Spreading disaffection towards police is an offence. Everyone has the duty to help police in restoring law and order in society. There is no doubt that our Police force is one of the best in the country. To make our police still more and more efficient and instructed, some officers, by turn, may be sent for advanced training in detection and decision in modern crimes and criminal practices. Such trained police personnel may be put in the police training College. They should undergo a training course in human right and cyber and other present day crimes and crime prevention.

Regarding the SULFAs suspected, it may be appropriate to observe that because of the position in which the SULFAs found themselves, between the devil and the deep sea..their erstwhile colleagues having been deserted by their act of surrender, they deserved adequate protection, but using their services as "guides, "spotters". trouble-shooters and collaborators in police functions could never be viewed as proper treatment meted out to the SULFAs, far less their being used as the striking arm or the men in charge of execution. Let them now be bereft of the hallowed positions, and give them fair field and no favour, at least following the insolvency principle of allowing the declared insolvent to have a fresh start in life. How the erstwhile affected people will adore or avoid them will be a different matter altogether. However, the Insolvency principle is not applicable to criminal law.

So far as the Government wings, agencies, and authorities, both official and political, the principle of "responsible superior" will surely apply; and for all the lapses and misdeeds at the lower levels, higher levels authorities shall be held liable and be subjected to proper punishments. So far as political and minister level authorities are concerned, the principle of collective responsibility may apply to all those who were forming Government in the State at the relevant period. This principle of collective responsibility will find them out wherever they happen to be, during the period when the violation of Constitutional and legal rights of the citizens was effected, and by those whose fundamental and other legal and human rights were violated during their governance. But even here, except in the criminal cases, the insolvency principle should be followed and the political persons also be given fair field and no favour in the ensuing political process of the State. Let there be no witch hunting of any sort. How the same affected people will accept or reject them will, of course, be an entirely different matter.

(F) Any other matter related or relevant to the inquiry

Under this the Commission would like to deal with the question of compensation , ex gracia, or on some reasonable basis. We are all proud to claim that our State is a welfare State. In case of any mishap or calamity befalling any one or more of our citizens or families, the welfare State considers it to its duty to offer rescue and relief to the affected persons and families, as the case may be. It is more so when the sufferer has reasons to feel that the State itself was the immediate or even remote cause of the misery. The rendering of rescue, relief and recompense does not in any way amount to any fault on the part of the State. It is really praiseworthy of the Chief Ministers of the States to have instantly announced such reliefs and rehabilitation packages, and offer in appropriate cases employments to the surviving eligible members of the families, inasmuch as sometimes the very bread earning patriarch is lost to the family. Even the Legislature has now provided for payment of suitable "no-fault liability" irrespective of the claim for fault liability. In the instant case a bread earning youth of the family has been shot dead under the circumstances discussed in the case. The public prosecution may result in punishment of the culprit, but that itself will bring no financial and livelihood replenishment of the loss suffered by the survivors of the bereaved family. The Commission, as submitted by the learned senior counsel for the Commission and the learned Senior Government Advocate, and for the ends of distributive justice, doth hereby direct the State Government of Assam to pay to Shri Ganesh Barman, father of the victim Khagen Barman, for the benefit of the family, a sum of Rs.5,00,000/-(Rupees Five Lakh) only.. More than six years have already elapsed, it brooks no farther delay..

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